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CASES ADJUDICATED

IN THE

SUPREME COURT

OF FLORIDA

DURING THE JUNE TERM, A. D. 1920.

REPORTED BY

RIVERS BUFORD

ATTORNEY-GENERAL

VOLUME LXXX

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JUSTICES OF THE SUPREME COURT.

DURING THE TIME OF THIS REPORT, FROM JUNE 8, 1920, TO
JANUARY 10, 1921.

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Hon. JAMES B. WHITFIELD.
Hon. WILLIAM H. ELLIS.
Hon. THOMAS F. WEST.

ATTORNEY-GENERAL.

Hon. VAN C. SWEARINGEN.

CLERK OF THE SUPREME COURT.

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THIRD CIRCUIT—Hon. MALLORY F. HORNE.
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*Died.

**Commissioned August 7, 1920.

APR 7 1922

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DECISIONS
OF THE
Supreme Court of Florida

JUNE TERM, A. D. 1920.

H. M. RICHARDS, *Appellant*, v. R. R. KIME, *Appellee*.

Decision Filed June 10, 1920.

Petition for rehearing denied July 10, 1920.

An Appeal from a Decree of the Circuit Court within
and for the County of Polk; John S. Edwards, Judge.

H. C. Petteway and *W. M. Gober*, for Appellant;

Whitney, Spencer & Bryant, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Realty Mortgage Co. v. Moore—Syllabus.

ANNA REGLER, *Appellant*, v. ALBERT C. BANKS, JR., BERTIE
FAIN BANKS, HIS WIFE, AND J. M. GAULT, *Appellees*.

Decision Filed June 10, 1920.

Petition for rehearing denied July 10, 1920.

An Appeal from a Decree of the Circuit Court within
and for the County of Pinellas; O. K. Reeves, Judge.

Lunsford & Whitaker, for Appellant;

Wm. G. King, for Appellees.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

REALTY MORTGAGE COMPANY, A CORPORATION, *Appellant*,
v. T. V. MOORE, *Appellee*.

Opinion Filed June 10, 1920.

1. (Foreclosure of Mortgage—Decree for Deficiency).—Upon the foreclosure of a mortgage upon real estate, the right of

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the complainant to a decree against the mortgagor for any balance that may be found to be due to the plaintiff over and above the proceeds of sale must be determined with reference to the pleading in connection with the evidence in each case.

2. (Foreclosure of Mortgage—Decree for Deficiency—Power of Court.)—Circuit Courts, in cases for the foreclosure of mortgages, under Equity Rule 89 of the Rules of the Circuit Court—In equity, have the power to enter a decree against the mortgagor for any balance that may be found to be due to the plaintiff, over and above the proceeds of sale.
3. (Foreclosure of Mortgages—Equity Rule 89).—Equity Rule 89 of the Rules of the Circuit Court in Equity, granting to such courts in suits in equity for the foreclosure of mortgages, the power to render a decree against the mortgagor for any balance that may be found to be due the plaintiff, over and above the proceeds of the sale or sales of the mortgaged property, does not deprive the court of its sound judicial discretion to determine the right to such deficiency decree.
4. (Foreclosure of Mortgages—Deficiency Decree).—Since the foreclosure proceeding is the judicial means by which certain property is subjected to the payment of the debt, and in which the amount of the debt is ascertained and decreed to be paid, it follows that any defense that may be offered to a decree of foreclosure, or against a personal decree, or for any balance that may be found due to the plaintiff over and above the proceeds of sale, should be presented in due course of the proceedings, or a sufficient reason given for not doing so.
5. (Foreclosure of Mortgage—Right to a Deficiency Decree).—A mortgagee may so deal with the mortgagor's grantee of the mortgaged premises as to deny to the mortgagee the right to a deficiency decree against the mortgagor.
6. (Foreclosure of Mortgage—Conveyance of the Mortgaged Property).—Where a mortgagor has conveyed the mort-

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gaged property, subject to the debt secured by the mortgage, before the maturity, before the maturity of the debt, and the conveyance recites that the grantee assumes and promises to pay the debt, but does not pay it on its maturity, nor afterwards; and the mortgagee grants extensions of time for the payment of the debt to the grantee of the mortgagor, against the expressed wish of the mortgagor, and continues to grant extensions for a long period of time after knowledge that such extension is against the wish of the mortgagor, and the debt still remains unpaid, begins a foreclosure against the mortgagor and the grantee of the mortgaged property seeking to sell the mortgaged property in satisfaction of the debt secured by the mortgage in the event the property does not sell for sufficient to satisfy the same, then for a deficiency decree against the mortgagor for such balance, it is incumbent on the mortgagor, in order to excuse himself for such deficiency decree, to allege and to prove that such extensions were against his wish, resulting in loss in value of the mortgaged property, or that he had requested a foreclosure of the mortgage while the property was sufficient to satisfy the demand. It is not necessary that such mortgagor should have used any precise words or expression in making the request to foreclose. His objection to such extension or extensions, the pointing out to the mortgagee of the danger in the depreciation of the mortgaged property after the maturity of the debt, in connection with the course of dealing by the mortgagee with the grantee, may be sufficient to deny the right to a deficiency decree.

7. (Foreclosure of Mortgage—Extensions of Time, Deficiency Decree).—Where the mortgaged property was sufficient to pay the debt on its maturity, and the mortgagee grants extension of time for its payment without the knowledge of the mortgagor, and when the mortgagor hears of it, protest against such extension made to the grantee of the mortgaged property, protest against the same and denies his liability by reason of such extension, points out the danger of the mortgaged property depreciating to the mortgagee, and thereafter other and continued extensions covering a period of several years after the debt became due, during which

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extended time the mortgaged property depreciates by reason of a freeze, and thereafter the mortgage is foreclosed and the mortgaged property did not sell for sufficient to pay the debt, the mortgagee has not the right to a decree for the deficiency.

8. (Foreclosure of Mortgage—Deficiency Decree—Equity Rule 89).—The power vested in Circuit Courts, in Equity, by Rule 89 of the Circuit Courts in Equity, for the foreclosure of mortgages declaring that a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of sale or sales, is a discretionary one, and may be granted or denied according to the facts and circumstances in each case.

An Appeal from the Circuit Court for St. Lucie County; E. B. Donnell, Judge.

Order affirmed.

Scott M. Loftin and Robert H. Anderson, for Appellant;

Hudson, Wolfe & Cason, for Appellee.

BULLOCK, Circuit Judge.—Appellant, as complainant in the lower court, and hereinafter referred to as the company, foreclosed a mortgage given to it by T. V. Moore, who is hereinafter referred to as the defendant, and after a sale of the mortgaged premises, report of and confirmation of the sale, which sale did not bring sufficient to pay the amount of the final decree and cost, applied for a deficiency decree against the defendant, which application was denied, and from the order denying this application takes its appeal to this court.

The record shows that the defendant was the owner of

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an undivided one-half interest in a certain described tract of land.

On January 24th, 1905, defendant gave the company his promissory note in the sum of three thousand dollars, due one year after its date, with interest at eight per cent. per annum, payable semi-annually, and to secure the payment of the said note gave a mortgage on his undivided one-half interest in said lands. The note is under seal and is copied at length in the mortgage.

The mortgage contains the usual provision for the payment of interest and the taxes on the mortgaged premises, cost, expenses and solicitors' fee, with a provision that "any default herein shall entitle" the mortgagor to foreclose. The mortgage was duly recorded January 27th, 1905.

On the 7th of March, 1905, the defendant, by warranty deed, conveyed his undivided interest in said lands to one Lillian A. Bray, a married woman, and placed her in possession thereof.

This deed of conveyance recited, "It is expressly agreed and understood between the parties hereto, that this deed is made subject to a mortgage of three thousand dollars," and refers to and describes the mortgage given by the defendant to the complainant, with the further statement, "and the party of the second part agrees to assume said mortgage." This deed was recorded on the 23rd of July, 1905. The company did not know of this conveyance until some five or six weeks after its execution.

Lillian A. Bray instituted partition proceedings of the said lands, to which the company was a party defendant, terminating in a final decree on July 11th, 1910, and commissioners appointed who made partition of the lands and

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reported the same, which report was approved and confirmed by the court on the 18th of July, 1910. Lillian A. Bray entered into the possession of the part allotted to her.

While there is some testimony in the record relative to a deed from Lillian A. Bray to J. C. Gay, no deeds have been introduced and it seems that it is immaterial for the determination of the matter now presented. The caretaker in the possession of the land on behalf of Mrs. Bray and others were parties defendant to the foreclosure and set up certain rights which are not material to consider, as they in no way involve the questions submitted.

On July 17th, 1914, the company filed its bill of foreclosure, in which it expressly recognized the partition of the lands and asserted its mortgage lien on the portion of the land allotted to Mrs. Bray. The bill of foreclosure is in the ordinary and usual form, with a prayer for the specific relief prayed and for general relief.

In determining the right of the complainant to decree for the deficiency, it becomes necessary to consider the pleadings and the testimony.

Interest on the note was payable semi-annually and a default in the payment of any installment gave the right to foreclose the mortgage. The first six months interest was paid at some time by Lillian A. Bray.

The answer of the defendant admits the execution of the note and mortgage; is without knowledge as to the partition of the lands, or of the interest of the other defendants; sets up the assumption of the debt by the grantee, and that the conveyance was with the knowledge and consent of the company, and that it agreed to look to Mrs. Bray for payment; and dealt with Mrs. Bray as

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the actual debtor, sent her interest statements and collected interest from Mrs. Bray and not the defendant. That without the knowledge of the defendant, complainant made agreements for the extension of time of payment, and that when the defendant discovered the agreements and extensions he protested, and that he explained to the complainant the nature of the security, and the danger of depreciation in value of the mortgaged premises, and that in spite thereof the complainant, after the information thus given, made further extensions, permitted the Brays to gather the pineapple crops grown on the land and retain the proceeds thereof, and by reason of the extensions neglected the mortgaged premises and the value greatly depreciated, when if it had not been for the extensions and the mortgage foreclosed sooner, the mortgaged property would have been sufficient to satisfy the decree. Defendant claimed that the complainant had estopped itself to claim or demand any deficiency decree against him by its conduct.

The sufficiency of this answer was not questioned.

The note became due 24th of January, 1906, with six months accrued interest. July 16th, 1906, the company addressed a letter to the defendant stating that "Mr. R. E. Bray states that he cannot well pay more than \$500.00 on the \$3,000.00 mortgage which you and your wife gave us," and called attention that the note was due January 24th, 1906. The letter, continuing, said: "At Mr. Bray's earnest request we extended it six months," and further stated as defendant was primarily liable, "We do not feel like agreeing to extend it again without your consent." To this letter the defendant immediately replied, on July 19th, 1906, expressing surprise, and said: "If you expected me to see this loan paid you certainly should

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not have granted an extension from January 25th, 1906, to the present time without my consent, thus giving the holder of the property not only the benefit of the year's crop, but giving him the advantage of curtailing expenses at the expense of future crops. Pineapple property, especially, does not remain at a standstill, but appreciates or rapidly depreciates, according to the attention it receives. I may say I certainly should not have agreed to an extension in the circumstances, if I had been liable for the debt and had been advised at the time."

On August the 13th, 1906, the company replied to the letter of the defendant last mentioned, stating that Mrs. Bray had paid interest to January 24th, 1906, but no part of the principal, and submitted the question to the defendant if he was "willing to have it extended any longer," saying, if not, "we must foreclose." To this letter the defendant replied; "9-16-1906," saying, "I must refer you to my letter of July 19th, to which I can add nothing further."

As between the complainant and the defendant the matter of the note, or its payment, was not mentioned for about four years, when on January 29th, 1910, a statement of interest was sent by the company to the defendant, which statement said: "The interest, amounting to \$120.00, on your mortgage fell due on Jany. 24th, 1910. Please remit or call at my office and settle PROMPTLY and oblige," to which the defendant immediately replied stating that when the company "arranged with the owner of the property which the mortgage covers for an extension, without giving me, or my interest consideration, I felt then and now that I could not longer justly be held responsible for the result." To this disclaimer of responsibility and charging the improper extension and warn-

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ing against the results, the company replied on February 11th, 1910, saying, "Sending the interest notice to you was an error on the part of my stenographer and I regret that the matter occurred."

No further transactions or communications between the company and the defendant took place.

The bill was filed and after issue the matter was referred to a master and witnesses were examined, but we cannot see that the testimony has any bearing on the matter other than the fact of establishing the condition and value of the mortgaged property at the different dates mentioned. The letters hereinbefore referred to were introduced in evidence before the master.

The company introduced Mr. Chillingsworth, who is in fact the company, as a witness, who testified that the company looked to defendant for payment and never agreed to accept Mrs. Bray as its debtor, and the company did not know of the sale for several weeks; said that one of the real inducements influencing the loan was "The personal credit and standing of" defendant, perhaps what bankers commonly call the moral risk, that it was good.

We have been much impressed with the fact that if the moral risk, "or personal credit and standing" of the defendant with the complainant was good and largely influenced the loan, why it was that the complainant allowed practically four years to pass and never refer to the matter until long after the note was due, and when by some "error on the part of the stenographer," defendant was notified of the accrued and past due interest, for which he immediately repudiated his liability, that the company saw fit to apologize for sending the notice. When Mr. Chillingsworth testified, and with this letter

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in the record, he did not see fit to make any explanation of this matter. We are left to conjecture and may we not, with the greatest propriety, in view of the testimony showing the value of this property all of this time, and the course of dealing between the company and the grantee of defendant, conclude that it was not so much the moral risk, or "personal credit and standing" of defendant, but of the company's reliance on the value of the property? Evidently the company, at that time, was satisfied to look to the mortgaged property for the debt. Defendant appreciated the danger to such property and cautioned the company and gave the reasons for apprehension of depreciation, protested against extensions, notwithstanding which the company saw fit to grant continued and repeated extensions for practically eight years, and when disaster came, is relying on the "personal credit and standing of defendant." Do not these facts rather suggest that at the time of the writing of the letter of apology that there was in the mind of the writer, Mr. Chillingworth, the real company, a consciousness of the fact that the course of dealing between the company and the Brays were such as to discharge defendant from liability?

The record shows that in the year 1904 the income from this mortgaged property was \$4,000.00, but it required skilful attention and fertilization, as often as three or four times a year. It sold in 1905 for a consideration of \$5,000.00; some 25 or 30 acres in pineapples, worth from \$300.00 to \$350.00 per acre as its reasonable market value; the pineapple grove remained in good condition from 1905 until 1910, but after the cold of 1910 the cold hurt it, or perhaps the cold of that year, 1910, hurt it. This was three or four years after the mortgage became due. Nothing seems to have been done towards rebuild-

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ing it since 1910, so that the very identical condition happened against which the defendant had cautioned the company and objected to an extension of time for the payment of the note.

The record shows that the property sold for \$1,510.00, leaving a balance due on the decree of \$3,632.10, for which the company now seeks a deficiency decree against the defendant.

This court is not called upon to determine whether or not a mortgagee could obtain a judgment against the grantee of the mortgaged premises, where the deed recited the existence of the mortgage and that the grantee had assumed its payment, but the sole question is whether the mortgagee company is entitled to a deficiency decree against the defendant under the circumstances as disclosed in this record.

Rule 89 of Rules of the Circuit Court in Equity is the only authority therefor. The Supreme Court of Florida had the authority to adopt such rule. *Snell v. Richardson*, 67 Fla. 386, 65 South. Rep. 592.

This rule provides that "in suits in equity for foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of sale," and has been recognized by this court in several cases. *Snell v. Richardson*, *supra*, and cases cited at text page 374; *Etter v. State Bank of Florida*, 76 Fla. 203, 79 South. Rep. 724.

"Since the foreclosure proceeding is the judicial means by which certain property is subjected to the payment of the debt and in which the amount of the debt is ascertained and decreed to be paid, it follows that any defense

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that may be offered to a decree of foreclosure, or against a personal decree for the debt, should be presented in due course during the proceedings, or a sufficient reason given for not doing so." *Etter v. State Bank of Florida, supra.*

The defense against a deficiency judgment was set up in the proceeding of foreclosure. The defendant's answer insisted that by reason of the company's course of dealing and extensions of time, it had estopped itself to claim a deficiency decree.

The evidence fails to show that the company ever gave any verbal or written statement that it would look to the vendee of the mortgaged premises, or that it had discharged the defendant, but it is abundantly shown that it knew about the transfer within a few weeks after the conveyance, and did negotiate with the grantee and collect interest from the grantee, and made repeated extensions to the grantee for the payment of the note, over the protest of the defendant, and as far back as July 16th, 1906, recognized the defendant's rights, writing the defendant that "we do not feel like agreeing to extend it again without your consent."

It was then that the defendant expressed surprise; and rather upbraided the company for allowing the grantee to gather the crops and appropriate the proceeds, and told them about the nature of pineapple property as likely to deteriorate in value.

The briefs of the learned solicitors have dealt at great length with the law relative to the right of the mortgagee to look to grantee of the mortgaged premises, where the deed to him recites the existence of the mortgage and a recitation in the conveyance that such vendee assumes

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its payment. This question is not necessarily involved. It is a vexed problem, as was said by MR. JUSTICE GRAY in *Union Mut. Life Ins. Co. v. Hanford*, 143, U. S. 187, 12 Sup. Ct. Rep. 437: "Few things have been the subject of more difference of opinion and conflict of decision than the nature and extent of the right of a mortgagee of real estate against a subsequent grantee, who by the terms of the conveyance to him agrees to assume and pay the mortgage."

The answer of the defendant does not set up the fact that by reason of the conveyance by him to Mrs. Bray and the recitations therein contained, that she became the principal and he surety for the payment of the debt, and that by reason of the unauthorized extensions he became discharged. It does set up the fact that it was agreed and understood between the defendant and his grantee that such grantee "should assume and pay off the mortgage, when due," and further stated that complainant "agreed to look to the" said grantee for the "payment of the mortgage."

The record does not show any such an agreement in express terms.

We have already noted that the sufficiency of this answer has not been questioned or tested in any manner. The answer does set up as a defense, against any deficiency judgment, the facts and circumstances and the course of dealing between the company and the vendee of the defendant, which were over the objections and against the expressed wish of the defendant, and while the record does not disclose any direct request, in positive terms, to foreclose the mortgage, it is bristling with abundant evidence of the various, continued and repeated extensions, directly opposed to the wish and interest of

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the defendant, arbitrarily exercised by the company, culminating in the depreciation of the mortgaged property.

It cannot be said that it was encumbent on the defendant to have used any precise language or certain form of expression to indicate his wish or request that the company foreclose.

The repeated protests of the defendant to the company against extensions from the very first, and the pointing out of the danger of loss by the depreciation in value of the mortgaged security, and more especially when associated with the disclaimer by the defendant of liability by reason of the making of the extensions, were tantamount to a *request* to foreclose. It certainly shows that he did not assent.

The case of *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. Rep. 119, has been cited. This case is clearly distinguishable from that in many respects. First, in the case cited the grantee *did not agree* to assume payment; second, no showing was made that he did not assent to the extensions. This cited case rather indicates that if there had been proof that there was no assent to the indulgence and proof of the assumption, the ruling might have been otherwise. Here we have not only proof that defendant *did not consent* to continuance, but abundant proof that he protested against indulgence.

What this court is called upon to determine is, "Has this mortgagee so dealt with the vendee of the mortgaged premises that he can come into a court of equity, under the facts and circumstances disclosed by this record, and demand a deficiency decree against the mortgagor?"

Mr. Jones, in his work on mortgage foreclosure, Sec. 742, says: "If the mortgagor request the mortgagee upon

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the maturity of the mortgage to foreclose it, on the ground that the premises are then sufficient to satisfy the mortgage, but might depreciate so as to become inadequate, the mortgagor will not be liable for a deficiency which occurs through the mortgagor's neglect to comply with the request."

Counsel for appellant in his brief calls attention to what we have quoted above from MR. JONES and says that appellee's solicitor did not "quote all of the law as laid down by MR. JONES, and he refers to the succeeding paragraph by MR. JONES, where he said: "But the mere neglect of the holder of a mortgage to enforce it when he has not been requested," etc.; will not discharge the mortgagor. This statement in no manner qualifies what is stated in the previous paragraph, for it is to be noticed that the statement is "The mere neglect, when he has *not been requested*" to foreclose.

Under Equity Rule No. 89, above cited, the history of and effect thereof, is set out at some length in the case of *Snell v. Richardson*, *supra*.

Has a mortgagee, in a mortgage foreclosure, where the mortgaged property did not sell for sufficient sum to satisfy the decree, the unqualified and absolute right to demand that a decree be rendered in his favor against the mortgagor "for any balance that may be found to be due to the plaintiff, over and above the proceeds of sale or sales," or, does such right depend on the facts and circumstances in each case, and that such "a decree may be rendered" when those facts and circumstances, in the sound discretion of the chancellor, justify it?

In discussing our rule above noted, this court in the case of *Etter v. State Bank of Florida*, *supra*, said: "The

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power vested in the Federal Courts by the rule (Federal Court Rule) is a discretionary one and may be exercised or not as the court deems best. *Phelps v. Loyhed*, 1 Dill (U. S.) 512." Fed. Cas. No. 11,077.

We have noted that the rule referred to is Rule 92 of the Supreme Court of the United States, but the Supreme Court of Florida, in adopting Rule 89 of Circuit Courts in Equity Actions, "followed closely the language" of Rule 92 of the Supreme Court of the United States, and why should it not receive the same construction?

From the record, it has not been shown that the chancellor committed any error in refusing the application for deficiency decree, and the order appealed from should be affirmed.

PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the court that the order herein be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

Lowman et al. v. State of Florida—Syllabus.

A. IRVING LOWMAN AND FLOYD BRASWELL, *Plaintiffs in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed June 10, 1920.

Petition for Rehearing Denied July 5, 1920.

1. Where the evidence does not expressly locate the crime as having been committed in the county charged in the indictment, but there are in the evidence references to various localities and landmarks at or near the scene of the crime, known by or probably familiar to the jury, and from which they may have reasonably concluded that the offense was committed in the county alleged, it is sufficient proof of venue.
2. Venue need not be established beyond a reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be sufficient.
3. To render dying declarations admissible, the judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope of recovery. This absence of all hope of recovery and appreciation by the deceased of his speedy and inevitable death is a preliminary foundation that must always be laid to make such declarations admissible. It is a mixed question of law and fact for the judge to decide before permitting the introduction of the declaration itself. It is not necessary that such preliminary test should consist of express utterances, but it may be gathered from any circumstances or from all the circumstances of the case.
4. In the trial for a capital offense if an adult defendant unobserved by the court or its officers voluntarily goes into a

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room adjoining the court room for purposes of his own and remains for a very few moments while a witness for the State is being examined, or while a proposed juror is being examined on his *voir dire*, the defendant being represented by counsel, such temporary and voluntary absence from the court room during the progress of the trial is not a violation of the defendant's organic or statutory rights, and will not cause a reversal of a judgment of conviction that is amply supported by competent evidence, and it does not appear that the defendant could have been harmed or prejudiced by his voluntary absence for such a brief time during the trial.

A writ of error to the Circuit Court for Hernando County; W. S. Bullock, Judge.

Judgment affirmed.

Thomas Palmer, George C. Martin and F. B. Coogler,
for Plaintiffs in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis,* Assistant, for the State.

WHITFIELD, J.—Upon an indictment charging murder in the first degree in Hernando County, Florida, by fatally shooting Ben. T. Harrell, “unlawfully and from a premeditated design to effect the death of the said Ben T. Harrell,” the plaintiffs in error were convicted of murder in the first degree with a recommendation to mercy, and took writ of error to a judgment imposing a life sentence.

It is contended here that “no venue whatever” was proven; that the court erred in admitting in evidence “the so-called dying declaration of Ben T. Harrell,” the deceased, and that the motion for new trial was errone-

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eously denied in that it was shown "that the defendants A. Irving Lowman and Floyd Braswell were absent from the court room and out of the hearing of the trial of said cause during a material part of the proceeding of said cause."

Where the evidence does not expressly locate the crime as having been committed in the county charged in the indictment, but there are in the evidence references to various localities and landmarks at or near the scene of the crime, known by or probably familiar to the jury, and from which they may have reasonably concluded that the offense was committed in the county alleged, it is sufficient proof of venue. *Duncan v. State*, 29 Fla. 439, 10 South. Rep. 815; *McCune v. State*, 42 Fla. 192, 27 South. Rep. 867; *Leslie v. State*, 35 Fla. 184, 17 South. Rep. 559; *Smith v. State*, 29 Fla. 408, 10 South. Rep. 894; *Andrews v. State* 21, Fla. 598; *Bryan v. State*, 19 Fla. 864; *Hopkins v. State*, 52 Fla. 39, 42 South. Rep. 52; 16 C. J. 769.

If the proof of venue does not come within the rule above announced, it will be insufficient. *Warrace v. State*, 27 Fla. 362, 8 South. Rep. 748; *McKinnie v. State*, 44 Fla. 143, 32 South. Rep. 786; *Smith v. State*, 42 Fla. 236, 27 South. Rep. 868; *Cook v. State*, 20 Fla. 802; *Robinson v. State*, 20 Fla. 804; *Evans v. State*, 17 Fla. 192; *McCoy v. State*, 17 Fla. 193.

Venue need not be established beyond a reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be suffi-

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cient. *Warrace v. State*, 27 Fla. 362, 8 South. Rep. 748; *Andrews v. State*, 21 Fla. 598.

In this case there is testimony that the homicide was committed at a place or town called Istachatta, which the trial court and the jury must have known and this court knows is in Hernando County. See *Howard v. State*, 172 Ala. 402, 55 South. Rep. 255, 34 L. R. A. (N. S.) 990; *Dupree v. State*, 148 Ala. 620, 42 South. Rep. 1004; 16 C. J. 770; *Commonwealth v. Kaiser*, 184 Pa. St. 493, 39 Atl. Rep. 299. It is not material whether Istachatta be incorporated or not; it is a village and a station on a railroad, with a postoffice, in Hernando County, Florida. See 15 R. C. L. 1083, 1085, 1118; *Central Railroad & Banking Co. v. Gamble*, 77 Ga. 584, 3 S. E. Rep. 287; *Smitha v. Flournoy*, 47 Ala. 345. The venue was sufficiently shown. *Leslie v. State*, 35 Fla. 184, 17 South Rep. 559.

A witness for the State testified that he saw the deceased the morning after he was shot, and that "I asked him if he didn't think he was getting along pretty well, and would get over it, and would be all right in a short time, and he said, 'No, they have got me. I can't get over it.'" "I asked him again; perhaps he wasn't as badly wounded as he thought he was, and he repeated about the same, he first said: he says, 'They have got me; I can't get over it; I can't recover.'" "Did he state to you in so many words, or to that effect that he was expecting immediate death—right now? A. No; he didn't say that in those words; no sir. Q. Did he say anything to you that he himself had no hope of recovery? A. He didn't use those words. Q. He simply said, 'They have got me?' A. Yes. Q. And 'I don't expect to get well;' 'I don't expect to recover?' A. 'I can't live.' Q. 'I can't

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live?" A. He used on one occasion. Q. But did he say a single word that he expected the result to be immediate? A. He didn't say that."

"In the case of *Lester v. State*, 37 Fla. 382, 20 South. Rep. 232, it was held that: 'To render dying declarations admissible, the judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope of recovery. This absence of all hope of recovery, and appreciation by the deceased of his speedy and inevitable death is a preliminary foundation that must always be laid to make such declarations admissible. It is a mixed question of law and fact for the judge to decide before permitting the introduction of the declaration itself. It is not necessary that such preliminary test should consist of express utterances, but it may be gathered from any circumstances or from all the circumstances of the case.' *Dixon v. State*, 13 Fla. 636; *Richard v. State*, 42 Fla. 528, 29 South. Rep. 413; *Clemmons v. State*, 43 Fla. 200, 30 South. Rep. 699; *Gardner v. State*, 55 Fla. 25, 45 South. Rep. 1028."

Guided by these authorities and the cases therein approvingly cited, we do not think the court erred in admitting the declarations of the deceased in this case. *Copeland v. State*, 58 Fla. 26, 50 South. Rep. 621; *Newton v. State*, 51 Fla. 82, 41 South. Rep. 19; *Richard v. State*, 42 Fla. 528, 29 South. Rep. 413; *Clemmons v. State*, 43 Fla. 200, 30 South. Rep. 699.

Grounds of the motion for new trial assert that the defendants were at different times each voluntarily absent from the court room for a few minutes during the trial and affidavits in support of the assertions were filed. In denying the motion for new trial the court must have

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regarded the asserted brief voluntary absences of the defendants from the court room during the trial as not harmful to the defendants, or else that he held the affiants to be mistaken in a matter that he was cognizant of. It is suggested for the State that the matter cannot properly be presented by affidavits after the trial. *Van Houton v. People*, 22 Colo. 53, 57, 43 P. 137. If the trial court had observed or had been advised of an absence of the defendants or either of them from the court room during the trial, he doubtless would have made the bill of exceptions so state as a part of the proceedings *in pais*. In this case we will not hold that the matter was not properly presented by motion for new trial supported by affidavits. The State presented no counter affidavits.

An affidavit of A. Irving Lowman states "that during the trial of said case and while the jury was being examined as to its qualifications to try said cause, and while a prospective juror was being examined as to his qualifications to sit in said cause, that this affiant being anxious to learn something if possible concerning the juror being so examined and without realizing that he was violating any rule of said court, this affiant got up from his seat back of his counsel and inside of the bar rail of said court, and without saying anything to any of his attorneys, walked out of the northeast door of the court room to make such inquiry. Although this affiant does know that the examination of said juror was going on as he, this affiant, passed outside of said door; that this affiant was absent from said court room some five or ten minutes, the exact time of his absence this affiant does not know; that upon the return of this affiant to the court room the said examination had evidently ceased as there was no questions being asked this particular juror. This affiant further says on oath that this particular

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juror, who was examined as to his qualifications in the absence of this affiant, was accepted on said jury and was one of the twelve jurors that tried this affiant and his co-defendant and found them guilty of murder in the first degree as above set forth."

By affidavit J. C. Davant stated "that he was in attendance upon the said court during the present week while the trial of the case of the State of Florida vs. A. Irving Lowman and Floyd Braswell charged with the murder of Ben T. Harrell was being tried; that he was especially present in said court while the jury to try said case was being examined as to their qualifications for the trial of the same; that he noticed particularly while one juror was being examined as to his qualifications and the same was taking place in the progress of said trial, the defendant A. Irving Lowman got up from his seat in the court room and went out of the room and was gone several minutes before returning to the court room, and while said defendant A. Irving Lowman was absent from the court room and beyond the hearing of the proceedings then going on, the examination of said juror on his qualifications continued, and this affiant knows that a large part of the examination of said juror took place in the absence of the said defendant A. Irving Lowman."

Floyd Braswell by affidavit stated: "That he is suffering, and has been suffering for a considerable time, with a very bad case of kidney trouble; that at times said disease is very acute and necessitates his going to a toilet and relieving himself every few minutes, and that it is impossible for this affiant to avoid so doing. That during the trial of the above named cause, in which this affiant was a defendant as above set forth, he many times had to thus go out of the court room to relieve himself; that

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he particularly remembers on one occasion while a State witness was being examined by the State's attorney in said case, this affiant was compelled to leave the court room and relieve himself as aforesaid; that not realizing that he was violating any of the rules of the court, and without speaking to his counsel or any one else, he got up from his place inside the bar rail of said court and went out of the court room through a door near the northeast corner of said court room, which door was closed behind him; that he from that place went through a hall to the toilet in the northwest corner of said building, but entirely outside of and beyond the court room; that he was there for several minutes and after relieving himself returned to the court room and resumed his seat."

An affidavit by Aaron H. Ryals states "that during the said trial of these defendants in said cause and in said court during the present week, and while a witness for the State was being examined, this affiant saw the defendant Floyd Braswell get up from his seat inside of the bar rail of said court and walk out of the court room to the north of the court building and saw a door through which he went out close behind him. That this affiant noticed that the examination of said witness was not stopped upon the absence of said defendant from the court room as aforesaid, but such examination of said witness continued right on in the absence of said defendant Floyd Braswell; that the said Floyd Braswell was absent from the room several minutes and during all of the time that he was so absent the examination of said State witness was continued by the State's attorney."

As the affidavits were not controverted, and as the motion for new trial was overruled without stating the

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reasons therefor, it will be assumed that the court regarded the asserted absences of the defendants from the court room for a few minutes during the trial as not harmful to the defendants, rather than that the court held the affidavits to be untrue as to the absence from the court room of the defendants as stated. Was the voluntary absence of the defendants from the court room under the circumstances stated harmful error, or was it such a violation of law as to require a reversal of the judgment of conviction fully sustained by the evidence?

The Constitution ordains "In all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him." Sec. 11, Declaration of Rights.

Section 3977, General Statutes, 1906, provides: "No person prosecuted for a felony shall be tried unless personally present during the trial."

Chapter 6223, Acts of 1911, is as follows: "No judgment shall be set aside or reversed, or new trial granted by any court of the State of Florida in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice. This Act shall be liberally construed."

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In *Gladden v. State*, 12 Fla. 562, text 577, this court by MR. JUSTICE WESTCOTT, said: "We will consider one" of the grounds presented in the motion for new trial "which was the absence of the prisoner from the court for some minutes three several times during the progress of the trial—at one time when one of the State witnesses was being examined, at another time when a witness for the defense was being examined, and a third time during the argument of counsel. The absence was voluntary, but without any express waiver of his right to be present.

"It is unnecessary for us to determine whether the prisoner can waive his right to be present during the trial, or whether a simple voluntary absence upon his part can be held to be a waiver of his constitutional right, and authorize the State to proceed in his absence. These questions have been settled in this State.

"This court has laid down the rule very broadly, and has, perhaps, extended it beyond the views of the courts of some other States.

"In *Holton vs. State*, 2 Fla. 500, the court say: 'During the trial of a capital case (the whole trial) the prisoner has a right to be and *must be present*. *No steps can be taken by the court in the trial of the cause in his absence. The prisoner charged must be present in court to make his objections to any and every step that may be taken which he may deem illegal.*'"

In *Irvin v. State*, 19 Fla. 872, text 894, in which JUDGE WESTCOTT participated, it is said: "We think the rule should be extended no further."

In *Morey v. State*, 72 Fla. 45, 72 South. Rep 490, it is said: "Upon the trial of an indictment charging the defendant with the commission of a capital offense, it is

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important that the defendant should be present at every stage of the trial, including the argument of counsel."

In this case the charge was a capital offense. The defendants had been out on bail and apparently were not in the actual custody of an officer during the trial. The momentary absences from the court room were voluntary, and there is nothing to indicate that any harm could have resulted to the defendants or either of them by the voluntary absence of the defendant Lowman from the court room for a few minutes during the examination of a juror as to his qualifications or by the voluntary absence of the defendant Braswell from the court room for a few minutes during the examination of a State witness.

The Constitution secures to a defendant a right to "an impartial trial" and "to meet the witnesses against him face to face," but it does not expressly require a defendant to be present during the entire time of the trial. A rule of procedure enforced by the courts has required the personal presence of the defendant during the whole period of the trial as stated in the Molton and Morey cases, *supra*. See Sherrod v. State, 93 Miss. 774, 47 South. Rep. 554; State v. Kelly, 97 N. C. 404, 2 S. E. Rep. 185.

The courts hold that the general right of the defendant to be present at every material step taken in his trial for a capital offense cannot be waived by him. In some States statutes authorize the defendant to waive his right to be present at least at times during his trial, even for a capital offense. And such statutes are sustained since there are no constitutional provisions with which they conflict. Thomas v. State, 117 Miss. 532, 78 South. Rep. 147; 16 C. J. 817. See also Davidson v. State, 198 Ark. 191, 158 S. W. Rep. 1103.

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A temporary absence from the court room, for a short time during the trial, even in a capital case, has been held not to be such an invasion of defendant's substantial rights as to be ground for a reversal or for a new trial. *State v. Rubaka*, 82 Conn. 59, 72 Atl. Rep. 566; 16 C. J. 818 and notes. See also *State v. Gonce*, 87 Mo. 627; 8 R. C. L. 91; *Diax v. United States*, 223 U. S. 442; 32 Sup. Ct. Rep. 250. See also *Russel v. State*, 65 Fla. 312, 61 South. Rep. 624; *Hite v. Commonwealth*, 14 Ky. Law 308, 20 S. W. Rep. 217; *Meece v. Commonwealth*, 78 Ky. 586; *Howard v. State of Kentucky*, 200 U. S. 164, text 175, 26 Sup. Ct. Rep. 189; *Frank v. Mangum*, 237 U. S. 309 35 Sup. Ct. Rep. 582; *State v. Slorah*, — Mo., — 106 Atl. Rep. 768, 4 A. L. R. 1256; *Frank v. State*, 142 Ga. 741, 83 S. E. Rep. 645; Ann. Cas. 1913C 1146 Notes.

The statute above quoted to the effect no person charged with a felony shall be tried unless personally present during the trial, is for the benefit of the defendant, and the right so given may be waived. See *People v. Bragle*, 88 N. Y. 585; *Cawthon v. State*, 119 Ga. 395, 46 S. E. Rep. 897; *People v. Bush*, 68 Cal. 623, 10 Pac. Rep. 169.

As the defendants were represented by counsel and were personally present at all other stages of the trial, their voluntary absence for a few moments from the court room should not under the circumstances render the trial invalid, even if erroneous; and under the statute of 1911, above quoted, the judgment should not be reversed or a new trial granted for an error of procedure that is harmless on the evidence where no right secured by the constitution that could not be waived has been invaded by the prosecution. There is no claim that the defendants

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did not have a jury of their choice under the law or that the trial was in every way fair and impartial.

The evidence amply sustains the verdict and there is no suggestion of the possibility of harm to the defendants or either of them by their own voluntary and momentary absence from the court room during the trial. *State v. Rubaka*, 82 Conn. 59, 72 Atl. Rep. 566.

The charge in this case is a capital offense, but the Constitution does not expressly require the presence of the defendants in the court room during the whole time of their trial for even a capital offense, and as the defendants met the witnesses against them face to face and had an impartial jury, and as the absence of the defendants from the court room was voluntary and for only a few moments, and as no harm to either of them seems possible and no harm is claimed to have resulted to either of them from their voluntary absence, the constitutional requirements have been complied with. The statutory right to be personally present during the trial has not been violated though the right may have been waived by the voluntary act of the defendants; and the statute forbidding new trials for harmless errors should be applied when no fundamental rights are thereby violated, the evidence fully sustaining the verdict. See *Doyle v. Commonwealth (Ky.)*, 37 S. W. Rep. 153.

In this case there was the voluntary act of a normal man in going from the court room where he was being tried for the crime of murder, into another room in the building and there remaining a few minutes for purposes of his own desire or convenience, while the juror was being examined on his *voir dire*, or while a witness for the State was being examined, the defendant being represented by counsel, when it does not appear and is not

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claimed that any disadvantage or harm to the defendant could have resulted from his voluntary and temporary absence from the court room. To hold that this is a denial to the defendant of his organic rights "to be heard by himself or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face" and not to "be deprived of life or liberty without due process of law" and to "the equal protection of the laws," or a denial of the defendant's statutory or common law right to be personally present "during the trial" or at every stage of or step taken in his trial for a felony, is to put vain technicalities above the substantial requirements of justice and security to the defendant, and to impair the integrity and power of the courts in administering the law and in securing to the defendant all of his rights in the premises.

Judgment affirmed.

WEST, J., concurs.

ELLIS, J., concurs in the conclusion.

BROWNE, C. J. AND TAYLOR, J., dissent on the question of absence from court room of the defendants in a trial for a capital offense.

BROWNE, C. J., dissenting. I dissent and state my reasons:

During the progress of the trial the defendant A. Irving Lowman left the court room while a prospective juror was being examined as to his qualifications, for the purpose of ascertaining something, if possible, concerning

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the juror who was being examined, and when he returned the examination had ceased. He was absent from five to ten minutes.

Floyd Braswell for personal reasons left the court room on several occasions; once while a State's witness was being examined by the State's attorney.

If there is any question that was supposed to be settled in this State by early, well considered and an unbroken line of decisions, it is that "during the trial of a capital case (the whole trial), the prisoner has a right to be, *and must be present*—no step can be taken by the court in the trial of the cause in his absence."

The earliest case is that of *Holton v. State*, 2 Fla. 476, where there is a very full discussion of the question. I quote in part from that decision. "While the justice of the rule here asserted is admitted, and an adherence to its principles conceded, it is of equal importance that the rights of the accused should be protected and preserved, and the essential forms of law prescribed for the mode of conducting the ascertainment of his guilt should be carefully observed and followed. A departure from them could not fail to produce difficulties and doubts. A recognition of a departure in one case, might lead to the adoption of another; and finally, those barriers, *which are guarantees for the regular and impartial* conducting of criminal cases, might be frittered away, and possibly eventuate in gross injustice. It is much easier to require the observance of the mandates of the law, than to determine in what cases they may be safely dispensed with. It is, therefore, more proper and more consonant to reason and justice to require a substantial adherence, than to suffer innovations upon the known and positive rules prescribed by law for the regular conducting of

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causes. The justice of these grounds is as clear and apparent as those which are founded on principles of humanity, by which the administration of criminal law has been marked, and *which declare that the accused stands on all his rights*, and waives nothing which is irregular, and more especially so where life is in the question."

"But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which is, that *during the trial of a capital case (the whole trial)* the prisoner *has a right to be, and must be present*—no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law and the tender regard it has for human life; which forbids that any proceedings shall take place in the trial of such a cause unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defense. Suppose that after the testimony has been taken the prisoner escapes, or becomes sick, and is unable to be brought into court, can the jury render a verdict? Suppose he escapes or is taken sick, and is thus disabled after the verdict has been received, can judgment be rendered? If he were to escape or become sick, and unable to remain in court while the testimony is being taken, or the charge is being given, would the cause proceed?"

The opinion in the instant case implies that there was no invasion of the prisoner's constitutional rights, but merely of a rule of procedure.

The Holton case, *supra*, treated it as an *invasion of the constitutional right of an impartial trial*, and I repeat

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for emphasis a portion of the opinion: "*A recognition of a departure in one case, might lead to the adoption of another; and finally, those barriers, which are guarantees for the regular and impartial conducting of criminal cases, might be frittered away, and possibly eventuate in gross injustice. It is much easier to require the observance of the law, than to determine in what cases they may be safely dispensed with.*"

Then came Mr. Justice Westcott's opinion in *Glad-den v. State*, 12 Fla. 562, where he said: "We will consider but one of them, which was the absence of the prisoner from the court for some minutes three several times during the progress of the trial—at one time when one of the State witnesses was being examined, and at another when a witness for the defense was being examined, and a third time during the argument of counsel. The absence was voluntary, but without any express waiver of his right to be present.

"It is unnecessary for us to determine whether the prisoner can waive his right to be present during the trial, *or whether a simple voluntary absence upon his part can be held to be a waiver of his constitutional right, and authorize the State to proceed in his absence.* These questions have been settled in this State.

"This court has laid down the rule very broadly, and has, perhaps, extended it beyond the views of the courts of some other States."

Justice Westcott then quoted part of the passage from *Holton v. State*, *supra*, and that it might burn into the minds of those charged with protecting accused persons in their constitutional rights, he placed the quotations in italics.

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The circumstances surrounding the absence of the prisoner in the Gladden case are strikingly similar to those in the instant case. Lowman was absent from five to ten minutes. He was absent "three several times," "the absence was voluntary."

The question next came before the court in *Irvin v. State*, 19 Fla. 872, where the court said:

"The rule is well settled in this State that the prisoner has a right to be, *and must be*, present during the trial of a capital case; that no steps can be taken by the court in the trial of the cause in his absence." Citing *Holton v. The State*, and *Gladden v. The State*.

Again the question comes before the court in *Adams v. State*, 28 Fla., 511. In that case the jury was sent from the court room while the competence of a witness was discussed. The prisoner's counsel proceeded with the discussion for about ten minutes when it was discovered that the prisoner had been taken from the court room with the jury. On the return of the prisoner to the court room, the judge requested his attorney to commence anew his argument so that the same matter could be gone over in the presence of the accused, but counsel refused to do this and the trial proceeded.

In reversing the case upon this ground this court said: "It was early decided in this State, and *has been rigidly adhered to in later decisions*, that the prisoner *has the right, and in fact must be present* during the trial of a capital case, and no steps can be taken by the court in his absence. There is no doubt about the fact that the accused here was taken from the court room and remained out for at least ten minutes during the discussion of the competency of a witness against him. He has the right

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to be present and to hear questions of law as well as questions of fact discussed, *and in fact no steps can be taken in the case in his absence. The court must see in capital cases* that the accused is present before any proceedings are taken in the case. The fact that the court directed the argument to be gone over again could not possibly restore the accused to the position of hearing what had already been said in his absence." Citing Holton v. State; Gladden v. State, and Irvin v. State.

The trial judge is charged with the duty of seeing that a prisoner has a fair and impartial trial. In the Holton case this court said that his presence in court during the entire proceeding is one of the guarantees of the "impartial conducting of the criminal cases." The presence of the accused in the court room is one of the things that this court has said that "the court must see." In Lovett v. State, 29 Fla., 356, the rule was again recognized, stated and affirmed. In that case a part of the head note by Mr. Justice Rainey is "It is *indispensable* to a legal conviction of a defendant on trial for murder that he should be personally present in court during the trial."

I have looked in vain for a definition of the word "indispensable" that would justify the conclusion in this case that his right to be present is a "vain technicality"; or that his presence "may be dispensed with for a short time," which is the doctrine of this case.

In Palmquist v. State, 30 Fla., 73, the necessity for the presence of the accused in court during the entire trial was regarded as so essential that it was held that the record must show it.

In the case of Summeralls v. State, 37 Fla. 162, MR. JUSTICE TAYLOR said:

"It is well-settled by repeated decisions here, as well as in other States, that in cases of felony the accused must be personally present in court during every stage of his trial from its beginning to and including the final passing of sentence. If it is shown that he was absent during the taking of any essential step in the trial, he cannot be said to have had a trial in due course of law."

Still no qualification of the principle; still no intimation that the right to have an impartial trial, or as MR. JUSTICE TAYLOR puts it, "a trial in due course of law," is a "vain technicality."

Section 6223, Acts of 1911, in no wise affects the matter under consideration in this case. There is no question involved "of the misdirection of the jury," "the improper admission or rejection of evidence" or a "matter of pleading or procedure," but instead there is involved what MR. JUSTICE DOUGLAS said was the *constitutional right to an impartial trial* and what MR. JUSTICE TAYLOR said was "due course of law."

Since the passage of that statute the case of *Morey v. State*, 72 Fla. 45, was decided by this court, and in an opinion by MR. JUSTICE ELLIS, he reiterates the rule and cites all the authorities where this principle was enunciated, strengthened, elaborated, affirmed and seemingly irrevocably fixed as law of this State, and no attempt was made to invoke the provisions of Chap. 6223 as authority for ignoring the previous decisions. The opinion in the instant case cites Sec. 3977, Gen. Stats., 1906, that, "No person prosecuted for a felony shall be tried unless personally present during the trial." This statute was enacted in 1868, and after the decision in *Holton v. State* and *Gladden v. State*, so that these decisions do not rest

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upon that statute, or any other statute, but upon a fundamental constitutional right.

So clear, so positive, so unequivocal is the unbroken line of decisions of this court since the Holton case, in 2 Fla., that the Attorney General begins the discussion of this question with the statement: "The facts being uncontroverted it follows, if the question is properly before this court, that *if the rule heretofore announced by this court in the cases cited by counsel is to be adhered to in all its rigidity, the contention must be sustained.*"

There is in this an implied invocation to this court to depart from "the essential forms of law prescribed for the mode of conducting the ascertainment of guilt" of which at the time when the courts were scrupulously careful to guard and protect constitutional rights, this court said that by such departure "those barriers, which are guarantees for the regular and impartial conducting of criminal cases, might be frittered away."

I cannot follow the invocation of the Attorney General which seems to have been followed by this court, and concur in what may fritter away any of the rights of an accused person on trial for his life.

TOM WITT AND ISHAM SWILLEY, *Plaintiffs in Error*, v.
THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed June 12, 1920.

1. Where there is substantial evidence which if the jury believes would sustain the verdict, and the trial judge refuses to set it aside, the verdict will not be disturbed.

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2. No error can be predicated upon the refusal to give a requested instruction that is substantially given in the general charge.
3. It is the duty of the trial court to instruct the jury on the law applicable to the facts proven, and a refusal to do so when asked will be error; but if a party wishes to avail himself of the omission of the court to charge the jury on any point in the case, he must ask the court to give the instruction desired; otherwise he will not be permitted to assign the omission as error.

A Writ of Error to the Circuit Court for Madison County; M. F. Horne, Judge.

Judgment affirmed.

Charles E. Davis, for Plaintiffs in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

BROWNE, C. J.—The plaintiffs in error were tried for murder in the first degree on an indictment charging Tom Witt as principal in the first degree, and Isham Swilley as principal in the second degree. A verdict of manslaughter was found against both.

The defendant and the deceased were young negroes, who with several other persons spent the early evening of the killing at a neighbor's house. The testimony does not disclose any bad blood or ill-feeling existing between the deceased and either of the defendants.

The only witness for the State who saw the killing testified in part, "They got to playing with the gun; Little Ned Wilkins got hold of Isham's gun, and Isham called

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to Tom Witt to make him turn it loose, and he called Tom to make him turn it loose, Tom came up and shot. I don't know exactly how close Tom came to little Ned before he shot;" "he shot him with a shotgun; Little Ned fell; Tom went off; he walked off; right after the shooting. I don't know how long little Ned lived after the shooting, I left directly he got shot. Tom walked up and shot little Ned right after Isham told him to make Ned turn the gun loose. Both these boys had guns that night and afternoon; Isham and Tom both had guns."

Both of the defendants denied that Tom Witt did the shooting. Swilley swore that it was his gun that killed the deceased, and that it was discharged while they were playing with it. On this point he testified, "After we got there and was talking, he came up there and grabbed my gun, and me and him and Mutt was pulling; it was Ned that grabbed my gun, and me and him and Mutt was pulling; it was Ned that grabbed my gun; he grabbed the barrel of it; it was a little fence about knee high; McRae and I were on one side and Ned on the other; no one else had hold of my gun, just us boys; there was a gun went off, it was my gun. It fired and hit him somewhere about here (indicating the breast), and after that we picked him up and carried him in the house. We boys were not mad with each other. Ned was drunk or had been drinking is how we came to scuffling over the gun.

"I was holding the stock to keep him from getting it, and John helped me, and Mutt Smity was helping the other fellow. I did not have any idea that the gun was going off. There was no feeling between Ned and myself at all. Ned worked at Mr. John Smith's. I worked at Mr. Smith's; we worked together. We had been working

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there together for over a year. Me and Mutt took him in the house after he was shot.”

The testimony is meager, and without the verdict of the jury that knew the parties and saw them testify, and the ruling of the court refusing to grant a new trial on the ground of the insufficiency of the testimony, barely supports the verdict. There was, however, evidence which if the jury believed would sustain the verdict, and as the trial judge refused to set it aside, we will not disturb it.

There was no error in the court refusing to give special charge number one, as requested by the defendants, as its substance was covered in the general charge. It has been repeatedly held by this court that where a requested instruction is substantially given in the general charge, no error can be predicated upon the refusal.

The ninth ground of the motion for a new trial relates to this instruction given by the court:

“Homicide is excusable when caused by the discharge of a gun which the slayer did not point at the deceased while he was not engaged in an unlawful act, and which is discharged without any carelessness or negligence on his part, and a homicide which is the result of any such carelessness or negligence on the part of the slayer is not more than manslaughter.”

This charge is not very clear, and without careful analysis, seems to be contradictory, but we cannot say its lack of clearness harmed the defendant, as the court instructed the jury clearly in his general charge upon the same points covered in the one complained of.

Even if the charge objected to in the seventh ground for a new trial is not as full as it might have been, “The

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rule in force in this State is that it is the duty of the trial court to instruct the jury on the law applicable to the facts proven, and a refusal to do so when asked will be error; but if a party wishes to avail himself of the omission of the court to charge the jury on any point in the case, he must ask the court to give the instruction desired; otherwise, he will not be permitted to assign the omission as error." *Rawlins v. State*, 40 Fla. 155, 24 South. Rep. 65; *Blount v. State*, 30 Fla. 287, 11 South. Rep. 547.

Finding no error, the judgment is affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

ARTHUR R. DOUGLAS AND CALLIE O. DOUGLAS, HIS WIFE,
Appellants, v. CLARA S. OGLE, AS EXECUTRIX OF THE
LAST WILL OF I. W. OGLE, *Appellee*.

Opinion Filed June 12, 1920.

1. The distinguishing element of actual fraud is always untruth between the parties to the transaction.
2. Constructive fraud is a term applied to a great variety of transactions which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud and for which it gives the same or similar relief as that granted in cases of actual fraud.
3. Mere weakness of mind unaccompanied by any other inequitable incident, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to set aside an agreement.

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4. Inadequacy of consideration in connection with other inequitable circumstances will justify the cancellation of an instrument.
5. Inadequacy of consideration, coupled with such a degree of mental weakness as would justify the inference that advantage had been taken of that weakness, will furnish sufficient ground for equitable interference.
6. Where a contract is executed on an insufficient consideration by one enfeebled in body and mind, a presumption of fraud arises, but the burden to establish the predatory conditions to the presumption is on him who would avoid the contract.
7. The findings of a chancellor on the facts will not be disturbed by an appellate court unless such findings are clearly shown to have been erroneous.
8. The obligation of a mortgage executed by a husband and wife on their homestead can not be enlarged by the mere substitution of a new note for a larger sum representing a further loan to the husband to which the wife was not a party.

An Appeal from the Circuit Court for Marion County;
W. S. Bullock, Judge.

Decree affirmed.

Trantham & Futch, for Appellants;

W. E. Smith, for Appellee.

REAVES, Circuit Judge.—The appellee, the widow of I. W. Ogle, deceased, and executrix of his will, filed her bill in the Circuit Court of Marion County against A. R. Douglas and wife and from a decree in favor of com-

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plainant defendants appealed. We shall refer to the parties herein as complainant and defendants as they stood in the lower court.

The purpose of the bill was to have a satisfaction of mortgage executed by the deceased to defendants declared void and to foreclose the mortgage which purported to have been satisfied, upon the alleged ground that said satisfaction was procured at a time when the deceased was very old and enfeebled in body and mind to such an extent that he was incapable of understanding the nature, effect and extent of the transaction, and without consideration in that the debt secured by the mortgage had not been paid, nor was any consideration paid for the satisfaction, and that said satisfaction was induced by false representations.

The answer denies all charges of fraud, says the debt had been paid long before the satisfaction was executed, and avers the mental capacity of the deceased to execute said satisfaction.

We adopt the concise grouping of assignments of errors used in appellants' brief as follows:

- A. Alleged errors based on the pleadings.
- B. Alleged errors based on the findings of facts.
- C. Alleged errors based on rulings as to competency of testimony.
- D. Alleged errors based on findings of law.

The only point argued under group "A" is that the bill fails to charge constructive fraud and that the evidence fails to show actual fraud and hence complainant ought not to have prevailed.

"The distinguishing element of actual fraud * * * is always untruth between the two parties to the trans-

action, so that actual fraud may be reduced to misrepresentation and concealment." Not so of constructive fraud. "Constructive fraud is simply a term applied to a great variety of transactions, * * * which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud," etc. Pomeroy's Eq. Jur. (4th ed.) §992. We have no difficulty in agreeing that the evidence does not show actual fraud, but we think the bill sufficiently charges constructive fraud. Without quoting from the bill, we think the brief summary above given is enough to show equity.

The law is well established that inadequacy of consideration in connection with other inequitable circumstances will justify the cancellation of an instrument. 9 C. J. 1176, Sec. 30. Also that mere weakness of mind unaccompanied by any other inequitable incident, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will is not a sufficient ground to set aside an agreement. 2 Pomeroy's Eq. Jur. (4th ed.) §947.

The bill alleges the total absence of consideration for the satisfaction, and that the deceased, when he executed the paper, was so weakminded as to be "wholly incapable of understanding the nature and extent of the transaction."

It is not necessary that there should have been a fiduciary relation between the parties; nor that it be positively shown that the one was not left to act upon his own free will in order to constitute constructive fraud, but "inadequacy of consideration coupled with such a degree of mental weakness as would justify the inference

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that advantage had been taken of that weakness will furnish sufficient ground for equitable interference." 9 C. J. Sec. 40, p. 1177; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 269; *Burke v. Taylor*, 94 Ala. 530, 10 South. Rep. 129; *Tracey v. Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610. And where a contract is executed on an insufficient consideration by one enfeebled in body and mind, a presumption of fraud arises. *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Boyd v. Boyd*, 123 Ark. 134, 184 S. W. Rep. 838; *Hattie v. Potter*, 54 Wash. 170, 102 Pac. Rep. 1023; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. Rep. 228; *Pomeroy's Eq. Jur.* (4th ed.) §947. But the burden to establish the predicated conditions to the presumption the law thus raises is on him who would avoid the contract. *Sellers v. Knight*, 185 Ala. 96, 64 South. Rep. 329.

In our discussion of the pleadings we have sufficiently covered the assignments of error based on propositions of law. Group "D." The assignments under group "C" are not argued, so we pass to group "B" or to alleged errors based on findings of fact.

In this connection it should be kept in mind that the findings of a chancellor on the facts will not be disturbed by an appellate court unless such findings are clearly shown to have been erroneous. *Simpson v. First Nat. Bank of Pensacola*, 74 Fla. 539, 77 South. Rep. 204; *Baggott v. Otis*, 65 Fla. 447, 62 South. Rep. 362.

Complainant undertook to show the following:

(1) That the debt secured by the mortgage had not been paid, and (2) that the deceased, at the time of executing the satisfaction was mentally incapable of understanding the nature and extent of the transaction. The law required no more than this, and the chancellor found

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that both said facts had been proven, and we think he was fully justified in so finding; at least we cannot say he was not justified.

On the point of whether the debt had been paid, several strong and unusual circumstances tend to corroborate complainant's testimony that it had not. Among them are (1) that the mortgage was retained by the deceased and found among his papers with another note (the new note) made by Douglas to him, dated Feb. 5th, 1915, for \$500.00; (2) defendant says the old note was paid July 6th, 1913, and it bears a notation on its face to that effect, but it is doubtful if this notation is in I. W. Ogle's handwriting. His banker says it is not, and the chancellor found that it is not; (3) this note as produced by defendant has a paper pasted over the back, thereby completely covering up endorsements on the back. The master, however, by the use of a glass, the application of a pure article of gasoline, and by exposing the paper to the sunlight, found these endorsements to read as follows:

(a) "I consent to an extension to Feb. 5, 15. Note of even date. I. W. Ogle."

(b) "Note and mortgage extended to Aug. 5. I. W. Ogle."

(c) "On the mortgage and note of even tenor and date of \$440 and \$60 to be covered by mortgage No. 6415 done by and the Aug. extended to Feb'y 5, 1915." The chancellor also examined this paper and his reading agrees with the master's except as to the last endorsement, and the variance there is not material. Also the original paper is before this court.

We should mention just here that the file number of the mortgage as endorsed thereon is 6415; also that the note is dated Feb. 5th, 1915, and matures Aug. 5th, 1915.

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(4) The fact that Ogle had the new note, together with the incongruous explanations thereof by defendant. In his answer he says this note was given to Ogle "as a means of raising money" for defendant "which this defendant supposes he intended to use as collateral for the purpose of raising the money." This answer is sworn to by defendant. But in his testimony he says this note "was just a copy." "I did not leave it for him to fill out, it was just a form to show me how he wanted it made out, without any interest and without any date to be paid. I was to pay him a certain amount every quarter as long as I used the money;" but says he got no money on this note.

(5) The endorsements on the back of the old note in Ogle's handwriting, apparently, from dates given and the subject matter, were made long after the date defendant says the note was paid and turned over to him.

On the other hand some circumstances tend to corroborate defendant's testimony that he paid the note (1) That he had it in his possession is a strong circumstance; and (2) that the satisfaction of mortgage was executed reciting that the debt had been paid.

Mrs. Ogle says the defendant acknowledged and promised to pay the debt after her husband died, and she is corroborated by two other witnesses; but defendant denies having done so. In this state of the evidence it is manifest that it was peculiarly the province of the trial court to determine the facts and his findings conclude us.

Deceased's mental state is described by numerous witnesses. Some of them observed him very little, and their testimony is of little value. But the effect of the evidence

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is that Mr. Ogle had serious and prolonged illness in 1912, and thereafter remained physically and mentally weak until his death in 1917, at the age of seventy-three. It is true that the parties who signed the satisfaction of mortgage as witnesses say that they did not observe any evidence of mental defect at that time, but they were with him very little on that occasion, and the memory of one of them especially as to what did occur is shown to be very hazy.

It is impossible for us to say that the chancellor's findings that the deceased did not understand the nature and extent of his act in signing the satisfaction was not justified.

A cross-assignment of error asserts that the court should have foreclosed the mortgage for the amount of the new note instead of limiting his decree to the old note with interest; but this contention must fail. Mrs. Douglas had executed the mortgage to secure the old note, and her husband and the mortgagee could not enlarge the lien on the land to which she had assented in statutory form, by increasing the debt, even though they may have thought and intended that the mortgage could and should stand as security for the new note.

The decree should be affirmed.

PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the court that the decree herein be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

Taylor et al. v. State ex rel. Sanders—Decision of Court.

J. P. TAYLOR, J. S. THOMAS, L. A. FRALEIGH, R. L. CAULK,
AND J. A. CAMPBELL, AS COUNTY COMMISSIONERS OF
MADISON COUNTY, FLORIDA, *Plaintiffs in Error*, v. STATE
ex rel. HARRY SANDERS, BY HIS NEXT FRIEND, C. C.
SMALL, *Defendant in Error*.

Decision Filed June 12, 1920.

Writ of Error to a Judgment of the Circuit Court
within and for the County of Madison; M. F. Horne,
Judge.

Chas. E. Davis, for Plaintiffs in Error;

A. B. and C. C. Small, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the Circuit Court be, and the same is hereby affirmed.

BROWNE, C. J., TAYLOR AND WEST, J. J., concur.

WHITFIELD AND ELLIS, J. J., dissent.

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R. C. HAMMERS, *Plaintiff in Error*, v. SOUTHERN EXPRESS COMPANY, A CORPORATION, *Defendant in Error*.

Opinion Filed June 12, 1920.

Where goods are delivered to a common carrier for transportation, and the consignor, being present where the goods are, attempts to sell and actually deliver the goods to a person there present, in violation of Federal law, an apparently lawful seizure of the goods by Federal officers as an incident to the arrest of the consignor for violating the Federal law in attempting to unlawfully sell and deliver the goods, exempts the carrier from liability for the value of the goods, where the seizure amounts to a *vis major*, and the carrier is not at fault in the premises.

A Writ of Error to the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Judgment affirmed.

McKay & Withers, for Plaintiff in Error;

W. A. Carter, for Defendant in Error.

WHITFIELD. J.—The declaration herein in effect alleges “that heretofore, to-wit, on the 2nd day of April, 1917, the said defendant was a common carrier of goods and chattels for hire, in and by a certain train of railway cars and in and by certain express cars, from a certain place, to-wit, from the City of Tampa, in the State of Florida, to a certain other place, to-wit, to the City of New York, in the State of New York. And the defendant being such carrier as aforesaid, the plaintiff heretofore, to-wit, on the day, month and year first aforesaid, at the special instance and request of the said defendant,

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caused to be delivered to the said defendant, so being such carrier as aforesaid, certain goods and chattels, to-wit, one box of medicine, the property of said plaintiff, of great value, to-wit, of the value of \$1,750.00, to be taken care of and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, in and by the said train of railway cars and in and by the said express cars, from Tampa, aforesaid, to New York City, to be safely and securely delivered by the said defendant for the said plaintiff to a certain person named Joe Peak, and certain charges thereon collected. And in consideration thereof, and of certain reward to the said defendant in that behalf, it, the said defendant, then, to-wit, on the day, month, and year aforesaid, undertook and faithfully promised the said plaintiff, in and by its certain bill of lading or express receipt, which it then and there issued, signed and delivered to the plaintiff, to take care of the said goods and chattels and safely and securely to carry and convey the same in and by the said train of railway cars and in and by the said express cars, from Tampa, aforesaid, to New York City, aforesaid, and there, to-wit, at New York City, the place last mentioned, safely and securely to deliver the same for the said plaintiff to the said Joe Peak, and before the said delivery to the said Joe Peak to collect for the plaintiff, and on account of the said shipment, from the said Joe Peak the sum of Seventeen Hundred and Fifty (\$1,750.00) Dollars, which sum was named in the said express receipt or bill of lading as and which sum was the true value of the said goods and chattels, and which sum the said defendant in and by its said contract, receipt and bill of lading agreed to collect on or before delivery and the same to remit and return to the plaintiff with all due expedition. And the said defendant, as such

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carrier aforesaid, then had and received the said goods and chattels for the purpose aforesaid.

"Yet the said defendant, not regarding its duty as such carrier, nor its said promise and undertaking so made as aforesaid, but contriving and intending to deceive and injure the said plaintiff in this behalf, did not and has not performed its said covenant, promise and undertaking, in this, that the said defendant carried the said goods and chattels to the destination aforesaid, and thereupon failed and refused to deliver the same to the said Joe Peak or to collect the sum aforesaid from the said Joe Peak or to remit the said sum to the plaintiff; but, on the contrary, the said defendant so carelessly and negligently behaved and conducted itself with respect to the said goods and chattels that by and through the mere carelessness, negligence, connivance and the improper conduct of the said defendant and its servants in this behalf the said goods and chattels were delivered by the said defendant to a person or persons other than the consignee, Joe Peak, which person or persons had no right or authority to receive the same, and the said defendant then and there, and from thence hitherto, did and has wholly neglected either to collect the sum aforesaid or any other sum on delivery, or to remit to this plaintiff the said sum or any other sum, or to return to the said plaintiff the said goods and chattels, but to do the same has wholly failed and refused. By reason whereof the said goods and chattels, as well as the said sum of money, became and were wholly lost to the said plaintiff. And plaintiff avers that claim for the above loss, damage and delay was duly made by him in writing, through his attorneys, to the said defendant at the point of origin, to-wit, Tampa, Florida, and within four months from the time of the occurrences aforesaid.

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"Nevertheless, the said defendant, not regarding its said several promises and undertakings, hath not kept, performed or fulfilled the same or either of them, although often requested so to do, but hath broken the same as aforesaid, to the damage of the said plaintiff of Three Thousand (\$3,000.00) Dollars. And therefore the plaintiff institutes this action of trespass on the case."

The following plea was sustained by the court:

"And for a third plea to each and every count of said declaration, defendant says that the plaintiff ought not to have or maintain his action against this defendant, for that the shipment mentioned and set out in each count of said declaration was one and the same shipment, to-wit, 25 ounces, more or less, of morphine sulphate and 25 ounces, more or less, of cocaine hydrochlorine and that the said shipment was from the City of Tampa, in the State of Florida, to the City of New York, in the State of New York, and that the plaintiff at the time of delivery of said shipment to the defendant misbranded said shipment in this, to-wit, that he branded said shipment as 'Medicine' and did not upon said package at any place set out or state, that the same contained morphine sulphate or cocaine hydrochlorine, and at the time of said shipment there was in force a valid statute of the United States of America, designated as the 'Anti-Narcotic Law,' prohibiting the sale, barter or gift of morphine sulphate and cocaine hydro chloride, except in pursuance of a written order of persons to whom the said articles were sold, bartered or given, on a form to be issued in blank by the Commissioner of Internal Revenue, and making such sale, barter or gift a misdemeanor.

"And the said defendant further says that the goods mentioned in each count of the declaration in this cause

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were one and the same, to-wit, sulphate morphine and cocaine hydro chloride, and that when the said goods had reached the City of New York in the State of New York, and were in the possession of the agents of this defendant, the said plaintiff did, in the said City and State of New York, in violation of the statute aforesaid, sell, barter and give away the same to a man by the name of William H. Fowle. Said sale, barter and gift was then and there made not in pursuance of a written order of the person to whom the said goods were sold, bartered or given, on a form issued by the Commissioner of Internal Revenue, and that thereupon the said officers of the law, while said goods aforesaid were in the office of this defendant and while the said plaintiff was in the office of this defendant, attempting to make delivery of said goods to said William H. Fowle, arrested the said plaintiff for the violation of said statute aforesaid, and the said goods in said declaration mentioned were seized by the said officer of the law to be used as evidence against the said plaintiff in a trial for the violation of said law. And thereafter, the said plaintiff was duly indicted in the District Court of the United States for the Southern District of New York, for the violation of said law, as herein set out, and the said goods aforesaid were used in evidence in said cause against the plaintiff, and the said plaintiff was then and there duly convicted of the violation of said law, as herein set out, and the said plaintiff gave notice of an appeal from this said conviction aforesaid, and the said goods herein set out were and still are, in the possession of the Government of the United States, for the purpose of being used as evidence in the trial of said cause against the plaintiff, in the event

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for any reason, the said conviction of the said plaintiff is reversed.

“All of which the defendant is ready to verify.”

Plaintiff refusing “to reply to or to take original issue on the said third plea of the defendant,” it was “adjudged by the court that the plaintiff’s action be dismissed for want of prosecution.” A writ of error was taken by the plaintiff. In support of the overruled demurrer to the third plea, “the contention of the plaintiff in error is:

“(1) That even though such fact were material, the plea shows no violation on his part of either of the Acts of Congress referred to.

“(2) That the violation of such laws would be immaterial in any event, even if shown, because the cause of action against defendant in error is an independent one, disconnected from the supposed illegal act, and founded upon a distinct and collateral consideration.

“(3) That the alleged seizure of the goods by officers without legal process would furnish no defense to the carrier.”

This is a judgment of dismissal upon refusal of the plaintiff to go to trial on a plea to the merits held to be good, not a judgment *quod recuperet* on the refusal of the defendant to plead further or to amend a plea to the merits held to be bad. If at a trial the plaintiff had proven the cause of action stated in his declaration and the defendant had not proven a defense under the plea, a judgment for the defendant could be reversed on writ of error. But where a plea to the merits under which a defense may be proven is sustained on demurrers, and

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the plaintiff refuses to go to trial on the plea, a judgment of dismissal because of such refusal will be affirmed.

Where a plea to the merits is of such a nature that under it a defense to the action may be proven, the plea should be sustained on demurrer; see *F. E. C. Ry. v. Chesser*, 77 Fla. 57, 80 South. Rep. 750; and if the plea is so framed as to prejudice or embarrass or delay a fair trial of the action, compulsory amendment thereof may be had under the statute. §1433 Gen. Stats. 1906.

A common carrier of goods is liable as an insurer for the value of the loss of or damage to goods received for shipment and injured in transit or not delivered at destination to the consignee, unless, without fault on the part of the carrier, such injury is caused or such delivery is prevented by an Act of God or by a public enemy, or by the inherent nature of the goods, or by the law, or by the person entitled to the goods or his agent.

Every contract for the transportation of goods by a common carrier is subject to a proper exercise of the police power of the State in which the shipment is made and to the Federal authority over the subject-matter and the means of transportation.

Where goods are delivered to a common carrier for transportation, and the consignor, being present where the goods are, attempts to sell and to actually deliver the goods to a person there present, in violation of Federal law, an apparently lawful seizure of the goods by Federal officers as an incident to the arrest of the consignor for violating the Federal law in attempting to unlawfully sell and deliver the goods, exempts the carrier from liability for the value of the goods, where the seizure

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amounts to a *vis major* and the carrier is not at fault in the premises.

The Federal statute alleged to have been violated regulates the sale of opium and its derivatives. Sec. 6287h, U. S. Comp. Stats. Morphine is a derivative of opium. See Webster's Dic., "Morphine." The sale here alleged to have been attempted was unlawful. *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. Rep. 214.

The unlawful sale set up in the plea appears to be a felony under the Federal law. Sec. 335, U. S. Crim. Code; Secs. 6287h and 6287o, U. S. Comp. Stats. 1918.

Officers of the Government have authority to make arrests for the commission of or for attempts to commit felonies in their presence. See *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. Rep. 148; *Roberson v. State*, 42 Fla. 223, 28 South. Rep. 424; 10 C. J. 282; 2 R. C. L. 447.

Where an officer arrests a person who is attempting to commit a felony by endeavoring to make an unlawful sale and actual delivery of property belonging to the person so arrested, which property is in the custody of a common carrier as bailee for the owner, and the officers making the arrest, and as an incident to the arrest, seizes the property for use as evidence against the person arrested, the carrier will be exempt from liability for the property, if the officers acted within their apparent authority and had power to enforce the authority asserted, and the carrier is not negligent or at fault in yielding to the official seizure of the goods. See 5 C. J. 434; *Spaulding v. Preston*, 21 Vt. 9; *Getchell v. Page*, 103 Me. 387, 69 Atl. Rep. 624, 18 L. R. A. (N. S.) 253 and Notes. See also *American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536; Ala-

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bama & Vicksburg Ry. Co. v. Tirelli, 93 Miss. 797, 48 South. Rep. 962, 17 Ann. Cas. 879; Railroad Company v. O'Donnell, 49 Ohio St. 489, 32 N. E. Rep. 476, 34 Am. St. Rep. 579; Eager v. Jonesboro, Lake City & Eastern Exp Co., 103 Ark. 288, 147 S. W. Rep. 60; Southern Ry. Co. v. Heymann, 118 Ga. 616, 45 S. E. Rep. 491; Danciger v. Atchison, T. & S. F. Ry. Co. (Mo. App.) 179 S. W. Rep 800.

The plea in this case indicates the presence of a *vis major* when the seizure of the goods was made by officers of the Government as a proximate result of the plaintiff consignor's wrong-doing, and no negligence or connivance of the carrier appears. The plaintiff cannot profit by his own wrong at the expense of the carrier who was not at fault.

In substance the declaration alleges a delivery of goods to the carrier for interstate shipment, and "that by and through the mere carelessness, negligence, connivance and the improper conduct of the said defendant and its servants in this behalf the said goods and chattels were delivered by the said defendant to a person or persons other than the consignee, Joe Peak, which person or persons had no right or authority to receive the same."

The plea in effect avers that the goods mentioned in the declaration were morphine sulphate and cocaine hydro chlorine and were in the possession of defendant when plaintiff in violation of the Federal law, did sell, barter and give away the same to W. H. Fowle; and that therefore the officers of the law, while the goods were in the office of the defendant and while plaintiff was in the office of the defendant, attempting to make delivery of said goods to said Fowle, arrested the plaintiff for the said violation of the Federal law, and the goods were

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seized by the said officer of the law to be used as evidence against plaintiff in a trial for the violation of said law; that thereafter plaintiff was duly indicted and duly convicted for said offense, and the goods were and still are in the possession of the United States, for the purpose of being used as evidence in case a new trial is granted to the plaintiff.

Even if this plea was subject to compulsory amendment for defects in its frame, its averments are sufficient as a basis for proving a complete defense to the action and the demurrer to the plea was properly overruled.

As the plea avers that the seizure of the goods was made while the plaintiff consignor was in person in the carrier's office attempting to deliver the goods pursuant to an unlawful sale of them, the seizure was apparently an incident to the arrest; and it does not seem to be material whether the plaintiff had the goods on his person or in his actual custody. He cannot hold the carrier responsible for a seizure of the goods under the circumstances stated in the plea by an officer of the Government whose laws were being violated by the plaintiff. In such circumstances the unlawful act of the plaintiff was the proximate cause of the seizure of the goods and the carrier does not appear to have been negligent or at fault. As the seizure of the goods was an incident to the arrest, it was not necessary for the officer to have a warrant or process for the seizure, and the averments of the plea indicate that the officer was acting under apparent authority, with power to enforce his authority, which shows a *vis major*, relieving the carrier of responsibility for the seizure as to which the carrier was apparently not negligent or at fault. A public carrier cannot be required or permitted to resist the authority of Government officials. The plea does not indicate connivance or

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negligence of the carrier. This conclusion is not in conflict with *Silverthorne, etc., v. U. S.*, 40 Sup. Ct. Rep. 182, decided January 26, 1920.

As the plaintiff refused to go to trial on the plea that was good as against the demurrer, the action was properly dismissed.

Affirmed.

BROWNE, C. J., AND TAYLOR, AND WEST, J. J., concur.

ELLIS, J., dissents.

RAYMOND JOHNSON, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed June 12, 1920.

1. It is not error to permit a non-expert witness to testify as to the nature of pistolshot wounds in the body of a person recently deceased and to state that the wounds, being "two big wounds" in the breast, were sufficient to cause the death of the person.
2. The judgment should not be reversed or a new trial granted in any case, civil or criminal, for errors in rulings upon the admission or rejection of evidence, or for errors in giving or refusing charges, or for errors in any other matter of procedure or practice, unless it shall appear to the court from a consideration of the entire cause that such errors injuriously affect the substantial rights of the complaining party. Nor should a judgment be reversed or a new trial granted on the ground that the verdict is not sustained by the evidence, unless it appears that there was no substantial evidence to support the finding, or that upon the whole evidence the verdict is clearly wrong, or that the jury were not governed by the evidence in making their finding.

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A Writ of Error to the Circuit Court for Columbia County; M. F. Horne, Judge.

Judgment affirmed.

Cone & Chapman, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WHITFIELD, J.—Upon an indictment for murder in the second degree Raymond Johnson was convicted of manslaughter, and on writ of error argues here that errors were committed in stated rulings upon the admissibility of testimony and in denying a new trial.

It is not error to permit a non-expert witness to testify as to the nature of pistolshot wounds in the body of a person recently deceased and to state that the wounds, being “two big wounds” in the breast, were sufficient to cause the death of the person. *Edwards v. State*, 39 Fla. 753, 23 South. Rep. 537; *Revels v. State*, 64 Fla. 432, 59 South. Rep. 951. It is conceded that the wounds caused the death, the defense interposed being the right of self-defense. *Bellamy v. State*, 56 Fla. 43, 47 South. Rep. 868.

The testimony as to statements made by the defendant that he killed the deceased, even if improperly admitted in evidence, was harmless, since the defendant admitted the killing and claimed self-defense as a justification.

There was no error in excluding testimony tending to show improper relations between the deceased and the defendant’s wife, as such matters had no direct bearing upon the issues being tried.

There is ample evidence to sustain the verdict and no errors of law or of procedure appear.

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The judgment should not be reversed or a new trial granted in any case, civil or criminal, for errors in rulings upon the admission or rejection of evidence, or for errors in giving or refusing charges, or for errors in any other matter of procedure or practice, unless it shall appear to the court from a consideration of the entire cause that such errors injuriously affect the substantial rights of the complaining party. Nor should a judgment be reversed or a new trial granted on the ground that the verdict is not sustained by the evidence, unless it appears that there was no substantial evidence to support the finding, or that upon the whole evidence the verdict is clearly wrong, or that the jury were not governed by the evidence in making their finding. *Welles v. Bryant*, 68 Fla. 113, 66 South. Rep. 562.

Judgment affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

C. D. CLARK AS SHERIFF OF CALHOUN COUNTY, AND FLYNN-HARRIS-BULLARD COMPANY, A CORPORATION, *Appellants*, v. ANNIE COX, A WIDOW, AND EVA COX, RUTH COX AND NETA COX, MINORS. BY ANNIE COX, THEIR NEXT FRIEND, *Appellees*.

Opinion Filed June 12, 1920.

1. The Constitution does not expressly require contiguity of lands for the exemptions of a homestead, and as the meaning of the word "homestead" is not defined in the organic provision on the subject, the question whether actual contiguity

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is required must be determined in each case on its peculiar facts.

2. A liberal interpretation should be given to the homestead provisions for the benefit of the family, but the beneficent provisions of the Constitution should not be used as a means to defraud.
3. Where a homestead has been acquired, it can be waived only by abandonment or by alienation in the manner provided by law.
4. Where land owned by the head of a family residing in this State constitutes the homestead, and is so occupied and used, the conveyance in fee of a strip 100 feet wide for the use of a public railroad right-of-way through the land does not destroy the homestead character of the land on both sides of the conveyed strip, where the land on both sides of the strip continued to be actually and exclusively used as parts of the home place for homestead purposes and for the support of the family.

An Appeal from the Circuit Court for Calhoun County,
C. L. Wilson, Judge.

Order affirmed.

John H. Carter, for Appellants;

R. H. Buford and *Paul Carter*, for Appellees.

WHITFIELD, J.—This appeal is from an order enjoining the forced sale of land claimed as a homestead.

The bill of complaint alleges that the complainant, J. M. Cox "is the owner and in possession of certain lands, to-wit, southeast quarter of northwest quarter, the northeast quarter of southwest quarter, and the south half of

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northeast quarter of Section 4, in Township 2 north, Range 9 west, and occupying the same as his homestead, and using the said land to produce a livelihood for himself and family; that complainant is the head of a family residing upon said land in said State and county, and that his said family beside himself consists of his wife, Annie Cox, and three minor children, all of whom are dependent upon this complainant and the products of this land for a livelihood, and there is now standing and growing and being a part of said realty certain crops of corn, potatoes, rice, cane and other food and food stuffs; that notwithstanding the fact that the above described land is the homestead of this complainant and comprises only 160 acres which is exempt, under the Constitution and the laws of the State of Florida, to this complainant from forced sale," the defendants have levied an execution thereon and have advertised the same for sale. An injunction was prayed. An order was made restraining the sale of the lands until further order of the court.

By answer the defendant execution creditor avers that the complainants "holdings consist of two separate and non-contiguous parcels, to-wit: a small parcel situated to the north and east of the Marianna & Blountstown railroad, upon which complainant's dwelling house, barns, etc., are located, and another parcel of about 76½ acres, more or less, situated to the south and west of said Marianna & Blountstown railroad, which is enclosed under separate fence, and is not contiguous to the dwelling house tract, and has no house or building upon it. That between said two tracts, and separating them as aforesaid, Rufus Pennington and C. R. Evans, co-partners under the firm name and style of Pennington & Evans, own in fee simple and without condition, reservation or re-

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striction whatsoever, a tract containing about six acres, more or less, described as follows: A strip 100 feet in width through the S.E.¼ of N.W.¼ and S.W.¼ of N.E.¼, Section 4, Township 2 north, Range 9 west, 50 feet of said strip being on each side of the center of the tract of the Marianna & Blountstown railroad, and said strip is permanently occupied and used by said Pennigton & Evans and their successors." Defendant "denies that the said J. M. Cox was at the filing of the bill of complaint, entitled to have the sale enjoined of that portion of the S.E.¼ of N.W.¼ and S.W.¼ of N.E.¼, and N.E.¼ of S.W.¼, 76½ acres, more or less, Section 4, Township 2 north, Range 9 west, which lies south and west of said tract or strip."

It appears that J. M. Cox, owner of the land, lived thereon with his family and used it as his homestead. Cox and his wife conveyed to "Rufus Pennigton and C. R. Evans co-partners under the firm name and style of Pennington & Evans," "a strip one hundred feet in width through the southeast quarter of northwest quarter and southwest quarter of northeast quarter, Section four, Township two north, Range nine west, fifty feet of said strip being on each side of the center of the track of the Marianna & Blountstown Railroad Co., as now located and operated."

"To have and to hold the above described lands and premises together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining unto the said part of the second part heirs and assigns in fee simple, forever."

It also appears that the railroad track and a country highway were in use on the 100-foot strip across the land when the conveyance of the strip was made; and that the

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owner and his family used the land on both sides of the 100-foot strip for homestead purposes, both before and after the conveyance of the 100-foot strip; that Pennington & Evans constructed and owned the railroad whose track was on the 100-foot strip, and that Cox and family lived on the east side of the strip and had a right to pass over the 100-foot strip in going to and from the portion of their land to the west of the strip. Does the conveyance of the 100-foot strip deprive the homesteader and his widow and heirs of homestead rights in the portion of the land on the opposite side of the 100-foot strip from the dwelling house? Assuming that contiguity in land is essential for homestead purposes, does the conveyance of the 100-foot strip by the owners for the purpose stated so destroy the contiguity of the land as to deprive the portion not containing the dwelling of its homestead character?

The Constitution provides that "A homestead to the extent of one hundred and sixty acres of land * owned by the head of a family residing in this State * and the improvements on the real estate, shall be exempt from forced sale," etc. Sec. 1, Art. X.

In *Brandies v. Perry*, 39 Fla. 172, 22 South. Rep. 268, 63 Am. St. Rep. 163, it was held that "The head of a family residing in this State is not entitled to claim as a part of his homestead, a detached tract of land separated from the homestead by other parcels of land neither owned nor occupied by the owner of the homestead, though such other tract be used and cultivated as a part of the homestead, and both tracts together do not exceed the constitutional limits as to quantity."

In *Milton v. Milton*, 63 Fla. 533, 58 South. Rep. 718, it was held that "a tract of land detached from or not con-

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tiguous to the land claimed as a homestead is not a part of the homestead exemption.”

In *Shone v. Bellmore*, 75 Fla. 515, 78 South. Rep. 605, it was held that “the mere platting of land, not within the limits of an incorporated city or town and sale of lots according to such plat, which land is owned by the head of a family and occupied by them as their homestead, does not destroy its character as a homestead nor conclusively show an abandonment of the homestead by the owner.”

The Constitution does not expressly require contiguity of land as a requisite to its homestead character. However, the word homestead has been held to mean “the *home place*, the place where the home is, and such is its legal acceptance at the present day. It is the home—the house and the adjoining land where the head of the family dwells—the home farm, (36 N. H. 136). ‘It is the land where is situated the dwelling of the owner and his family.’ (16 Wis. 638.) ‘A homestead necessarily includes the idea of a residence.’ (24 Texas, 224.) It must be the owner’s place of residence, the place where he lives. (23 Texas, 502; 10 Minn. 156; 5 Minn. 333; 7 Minn. 518; 42 Texas 443.) It must appear that the lands were actually used, or manifestly intended to be used, as a part of the home of the family. 21 Wall., 486. Waite, C. J.” *Oliver v. Snowden*, 18 Fla. 823, text 835. See also *Brandies v. Perry*, 39 Fla. 172, 22 South. Rep. 268.

If the rights conveyed for a railroad right of way are in law only a perpetual easement, this would not destroy the actual contiguity or impair the homestead exemptions. *Griswold v. Huffaker*, 47 Kan. 690, 28 Pac. Rep. 696; *Griswold v. Huffaker*, 48 Kan. 374, 29 Pac. Rep. 693; *Slaugh-*

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ter v. Karn, —Ky. App. —, 23 S. W. Rep. 791; Gibbs v. Adams, 76 Ark. 575, 89 S. W. Rep. 1008; Allen v. Dodson, 39 Kan. 220, 17 Pac. Rep. 667; Randal v. Elder, 12 Kan. 257; Shone v. Bellmore, 75 Fla. 515, 78 South. Rep. 605; 13 R. C. L. 578.

It would seem that as the Constitution does not expressly require contiguity of lands for the exemptions of a homestead, and as the meaning of the word "homestead" is not defined in the organic provisions on the subject, the question whether actual contiguity is required must be determined in each case on its peculiar facts. A liberal interpretation should be given to the homestead provisions for the benefit of the family, but the beneficent provisions of the Constitution should not be used as a means to defraud. Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 South. Rep. 440; Drucker v. Rosenstein, 19 Fla. 191; Pasco v. Harley, 73 Fla. 819, 75 South. Rep. 30. Where a homestead has been acquired, it can be waived only by abandonment, or by alienation in the manner provided by law. Riggs v. Sterling, 60 Mich. 643, 27 N. W. Rep. 705.

In this case it appears that the conveyance of the 100-foot strip across the land was for the use of a public railroad right of way, that a right to cross the strip in going to and from the portion of the land on the opposite side from the dwelling place was recognized in the owners of the homestead rights and that the land on both sides of the 100-foot strip were continuously and exclusively used for homestead purposes and the support of the family, the whole not exceeding the exempted area. This being so the land on both sides of the 100-foot strip "were actually used, and manifestly intended to be used, as a part of the home of the family" as set forth in the Oliver

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case *supra*. See *Grosholz v. Newman*, 21 Wall. (U. S.) 481, text 486.

There is nothing to indicate an abandonment of any part of the remaining land as a homestead. On the contrary, a purpose to retain the land on both sides of the alienated strip is evident. In the *Brandies* and *Milton* cases, *supra*, the lands excluded had never been a part of or contiguous to the homestead tracts that were allowed as exemptions.

Under the circumstances of this case it must be held that the conveyance of the 100-foot strip across the land for a railroad right of way did not deprive the remaining homestead real estate of its homestead character so as to withhold or abandon the right of exemption as a homestead in the land on both sides of the 100-foot strip. *Hodges v. Winston*, 95 Ala. 514, 11 South. Rep. 200; 13 R. C. L. 578; *Morse v. Morris*, 57 Wash. 43, 106 Pac. Rep. 468, 135 Am. St. Rep. 968; *Pryor v. Stone*, 19 Texas 371, 70 Am. Dec. 341.

Order affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

R. ENGLISH, *Plaintiff in Error*, v. THE STATE OF FLORIDA,
Defendant in Error.

Opinion Filed July 12, 1920.

Where E. using the name of J. sends a telegram to A. asking for a remittance of money by wire to J. and the remittance made by wire to J. is delivered to K., an accomplice of E., the re-

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ceipt for the money being signed by K. in J.'s name, and the money delivered by K. to E., Jones knowing nothing of the transaction, in an information charging E. with larceny of the money, the ownership of the money was not improperly alleged to be in J., and E. having received the money through his concerted fraud, may be convicted of larceny.

A Writ of Error to the Criminal Court of Record for Dade County; J. Emmet Wolfe, Judge.

Judgment affirmed.

Gautier & Riley, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gills*, Assistant, for the State.

WHITFIELD, J.—This writ of error was taken to a judgment of conviction on a charge of grand larceny. It appears that English, in this State, using the name of A. L. Jones, sent a telegram to A. in another State, asking for a remittance by wire to A. L. Jones. The remittance was made by wire to A. L. Jones and the money was delivered in this State to an accomplice of English, one Kelly, who signed for it in the name of Jones and delivered the money to English. Jones knew nothing of the transaction. In making the remittance A. transferred the title to the money to Jones through the telegraph company as bailee. Possession of the money was delivered by the bailee to English through Kelly by reason of the fraud of English, in which Kelly participated. No title to the money passed to English and the possession obtained pursuant to a preconceived felonious intent to appropriate to his own use was larceny, because the fraud vitiates the transaction, and the money in pursu-

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ance of the fraud was unlawfully taken from the lawful possession of the bailee of the owner with intent to feloniously appropriate it. The bailee gave no title to English. The ownership of the money was not improperly alleged to be in Jones to whom it was actually sent by A., and the possession fraudulently obtained from the bailee by Kelly was under the circumstances a fraudulent obtaining of possession from the bailee by English, who received the money from Kelly pursuant to the concerted fraud. See 17 R. C. L. 13, and cases cited; 2 Wharton's Crim. Law, p. 1351, Sec. 1126, 1167, and cases cited; People v. Miller, 169 N. Y. 339, 62 N. E. Rep. 418, 88 Am. St. Rep. 546, text 569; Commonwealth v. Collins, 12 Allen (Mass.) 181; 2 Bishop's New Crim. Law, §§ 812, 822.

Judgment affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

FRED B. NOBLE AS TRUSTEE IN BANKRUPTCY OF MASON HOTEL & INVESTMENT COMPANY, A CORPORATION, *Plaintiff in Error*, v. GEORGIA CASUALTY COMPANY, A CORPORATION, *Defendant in Error*.

Decision Filed June 23, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Duval, Daniel A. Simmons, Judge.

Abbott et al. v. King & Co. et al.—Decision of Court.

George C. Bedell and A. H. & Roswell King, for Plaintiff in Error;

Marks, Marks & Holt, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said Judgment of the Circuit Court be and the same is hereby affirmed.

BROWNE, C. J., AND WHITFIELD, ELLIS AND WEST, J. J., concur.

TAYLOR, J., disqualified.

G. L. ABBOTT AND LEILA ABBOTT, *Appellants*, v. F. W. KING & COMPANY, A CORPORATION, AND THE CROWN CORK & SEAL COMPANY, A CORPORATION, *Appellees*.

Decision Filed June 23, 1920.

An Appeal from a decree of the Circuit Court within and for the County of Santa Rosa, A. G. Campbell, Judge.

W. W. Clark, for Appellants;

Leroy V. Holsberry, for Appellees.

Wilson et al. v. The Coe-Mortimer Co.—Decision of Court.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

W. H. WILSON AND AGNES R. WILSON, HIS WIFE, *Appellants*, v. THE COE-MORTIMER COMPANY, A CORPORATION, *Appellee*.

Decision Filed June 23, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Osceola; James W. Perkins, Judge.

Johnston & Garrett, for Appellants;

Landis, Fish & Hull, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Order aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Order; it is, therefore,

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considered, ordered and adjudged by the Court that the said Order of the Circuit Court be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

ELLIS, J., dissents.

MATTIE INGRAHAM, *Appellant*, v. CHARLES INGRAHAM,
Appellee.

Opinion Filed June 25, 1920.

Where the material testimony adduced in a suit for divorce on statutory grounds is uncontradicted and wholly fails to support the allegations of the bill, the decree of the chancellor granting a divorce will be reversed.

An Appeal from the Circuit Court for Hillsborough County, F. M. Robles, Judge.

Decree reversed.

Jos. F. Miyares, for Appellant;

Harry N. Sandler, for Appellee.

BROWNE, C. J.—Mattie Ingraham appealed from a decree granting her husband, Charles Ingraham, a divorce on the grounds of adultery.

On May 2, 1919, the complainant filed a bill for divorce against his wife, charging her with violent and ungov-

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ernable temper and extreme cruelty. Issue was joined by answer and a special master appointed on the 18th of June to take the testimony. This was done on the 24th of June, 1919. After the completion of the testimony the complainant asked and was granted leave to amend his bill of complaint by adding this paragraph:

“And your orator further charges the said defendant in the City of Tampa and State of Florida, subsequent to the 30th day of August, 1918, in disregard and violation of her marriage duties and obligations, committed adultery with a man and men to your orator unknown, and that the said defendant is guilty of adultery.”

On final hearing the chancellor entered his decree granting the divorce on the grounds:

“That the equities of this cause are with the complainant, and that the defendant has committed adultery subsequent to her marriage with the complainant herein, as charged in said amended bill of complaint.”

It is not necessary to discuss the first assignment of error as the case must be reversed on other grounds.

There is no reference in the decree to the charges of violent and ungovernable temper and extreme cruelty, the divorce being granted upon the ground of adultery set up in the amendment to the original bill. The only evidence introduced to show the indulgence in violent and ungovernable temper or extreme cruelty covers two incidents which the complainant thus describes: “I asked her for the brush to brush my clothes off with, I asked her first to brush them and she said she would not, and then I asked her for the brush, I was standing over by the wash stand at the time, started to wash up and she threw

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the brush at me, and if I hadn't turned just in time it would have hit me. Q. When was the occasion when you stated that she hit you with the towel? A. The following week. Q. That towel you say she hit you with, was it a wet or dry towel? A. It was wet—she snapped it on me like that (indicating); the towel had been used and was damp on one end. Q. You charge in your bill of complaint that she had been guilty of habitual indulgence in a violent and ungovernable temper, did she exhibit outbursts of temper frequently? A. She did. Q. What would she do, in what way did she exhibit it? A. She would start up things by cursing me, and using the towel on me and throwing the brush, and one instance she ran out of the house in a one-piece garment, a sleeping garment, she ran a half block in that. Q. Was that in the day time or night time A. At night. Q. What time of night? A. Right after dark."

The complainant's mother and sister testify substantially to the same effect.

This testimony is wholly insufficient to support either charge.

The testimony as to adultery upon which the court granted the divorce, is equally insufficient.

The complainant and defendant were married on August 30, 1918, in Jacksonville, Fla., where defendant resided and went at once to Tampa to reside. After living for a short time on Fortune street, they went to live with the complainant's mother, and stayed there until the defendant returned to Tampa from a trip to Jacksonville.

The entire testimony by the complainant in support of the charge of adultery consists of statements said to

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have been made by defendant to the mother of the complainant and to a negro washer-woman.

The complainant's mother testified: "Only she didn't like Tampa and didn't like anything in Tampa; she was going back to Jacksonville if she had to go on the streets to earn money like other girls do. * * * Q. How many times did she tell you that? A. A good many times."

The negro washer-woman testified: "She would come out in the yard and talk to me; she told me that she wanted to go to Jacksonville, and that she was going if she had to go on the streets to get the money to go with. She came out to my house and talked; she said she was expecting some of her old fellows she used to know and go with, some of her old sweethearts, and wanted to know if she could bring them out to my house, and I finally told her that she ought not to come to my house that way, that I was a colored woman and it wasn't right for her to do that. She told me that she was going to Jacksonville just as soon as she could get the money; she said she would get the money if she had to go on the street. She said she was coming to tell me her business, and she said she was going to bring her fellows over when they got here from Jacksonville."

It is admitted by the complainant and defendant that in December, 1918, she went to Jacksonville. That the husband bought her railroad ticket. She remained away three months lacking a few days. She testified that she wrote to her husband every day for two months, but never heard from him. He only sent her money on one occasion; \$3.00 in obedience to an order of court after she had caused a warrant to be issued against him charging him with desertion. When she returned to Tampa in

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March she was pregnant—expected to give birth to a child in August. She went directly to the house of her husband's mother with whom she had been living before she went to Jacksonville, and was refused admission by his mother. She then went back to the station, and was advised by the matron to go to the Salvation Army home. They gave her a room for a week until she could get work. From there she took a room on Fortune street, and stayed a week until she was asked to give it up because the woman needed it for a party who wanted to do light housekeeping. She then got a room on Franklin street; went there at seven o'clock at night. With regard to this, she testified: "Q. How long did you stay there? A. One night. Q. What happened the night you were there? A. The house was raided. Q. Were you arrested in that raid? A. No sir. Q. Were you taken to the police station? A. No sir. Q. Were you taken from the house at all? A. No, sir. Q. You left Tampa again after that? A. Yes, sir. Q. Where did you get the money that time? A. Detective Thomas gave me the money. Q. Where did you go then? A. Went to Georgia, to my aunt. Q. How much money did Mr. Thomas give you? A. Ticket to Georgia. Q. Did he go to the station with you? A. No, sir. Q. Went by yourself? A. Yes, I did."

Not a word of testimony was offered to show that the defendant ever was in company with any man at any time or in any place, except her husband and the detective who gave her a ticket to go home with.

If we place the worst possible construction on her statement that "she was going back to Jacksonville if she had to go on the streets to earn money like other girls do," it amounts only to a statement of what she might do, and was not an admission of guilt.

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The same is true of the statement testified to by the negro washer-woman, that she was "expecting some of her old fellows she used to know and go with, some of her old sweethearts, and wanted to know if she could bring them out to her house." Not a word of testimony that she ever went there with any man, or ever attempted to do so.

If the expression "some of her old fellows she used to know and go with," is to be taken as meaning men with whom she had had sexual intercourse, it did not prove the charge of adultery committed "subsequent to the 30th day of August, 1918," because the complainant and defendant were married on that day, and moved at once from Jacksonville, and from the negro woman's testimony the men she was expecting were to come from Jacksonville. There is no warrant in the testimony for the conclusion that this girl had been guilty of immorality, but if there were, it would relate to acts committed before and not subsequent to their marriage on August 30th.

The testimony describing the specific acts of alleged cruelty and violent and ungovernable temper, is not contradicted, but taken as true, it falls far short of establishing either charge.

We have discussed her statements about what she would do if she had to in order to raise money to go back to Jacksonville, and about taking her friends to the negro woman's house, and it only remains to consider the defendant's testimony in relation to the raiding of the house where she had taken a room. Stript of verbiage, it is this—she took a room in this house at seven p. m. and it was raided at midnight. She was not arrested, not interfered with, and spent the rest of the night in the house.

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Whether the house was raided as a gambling house, or a place where violations of the prohibition law were supposed to take place, or as a meeting place of anarchists, or a resort of other immoral persons, does not appear from the testimony. Even if it had been established that the house was raided because it was supposed to be a sexually immoral house, no attempt was made to prove that this girl under twenty-one years of age—within five months of giving birth to a child, went there for an immoral purpose or knew the character of the house, if it was an immoral place.

There being no testimony upon which a divorce could be granted, on any of the grounds set up in the bill and the amendment, the decree is reversed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

ARTHUR BROOKE, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed June 25, 1920.

1. Where there is substantial competent evidence of all the facts legally essential to support the verdict, and there is nothing in the record to indicate that the jury were influenced by considerations outside the evidence, this court will not disturb the verdict.
2. "The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict, or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust."

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A Writ of Error to the Criminal Court of Record for Duval County; J. M. Peeler, Judge.

Judgment affirmed.

Axtell & Rinehart, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

BROWNE, C. J.—The plaintiff in error, Arthur Brooke, and Clara A. Turneau were convicted on the second count of an information charging them with violation of Section 3261, General Statutes of Florida, by verbally and maliciously threatening Isaac A. Stewart to accuse him of the crime of assault with intent to commit rape upon Clara A. Turneau, with intent to thereby extort money from him. Brooke seeks reversal on writ of error.

No useful purpose will be served by reciting the testimony or attempting to give a synopsis of it.

The complaining witness testified exhaustively as to what occurred between him and the two defendants, Arthur Brooke and Clara Turneau. The accused make two defences: One that Judge Stewart committed the crime they charged him with, and the other that there was no attempt by either of them to get money from him under threats to accuse him of the commission of the crime.

There was direct conflict between the testimony of Judge Stewart and that of the defendants on all the material matters that tended to support the charge. The trial judge gave very clear, correct and fair instructions on the province of the jury to pass upon disputed issues of fact. The result of the trial depended largely upon

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the credibility of the witnesses, of which the jury were the sole judges. The court instructed the jury that in the consideration of the testimony they "should consider the manner of the witnesses on the stand in the giving of his testimony; the bias or prejudice, if any, of the witness; the interest, if any, of the witness, in the result of his testimony; the intelligence, or otherwise, of the witness, in order that you may judge of the correctness of his observations and his ability to detail intelligently what he has observed; the position of the witness, both at the time of the happening of the event testified about and at the time of the giving of his testimony; the reasonableness, or otherwise, of his testimony as judged by your common sense, everyday experience; any conflict or discrepancies as to material questions which you may find to exist in the testimony of the witness, or the testimony of other witnesses whom you believe to have testified truthfully; any corroboration in the testimony of the witness whom you believe to have testified truthfully; and, in fact, gentlemen, it is your sole province to consider all the surroundings of the witness bearing upon his credibility, or otherwise, in arriving at the weight to be attached to their testimony. You must do this carefully, fairly and impartially under your oaths as jurors, empaneled to try this case."

The jury accepted the testimony of Judge Stewart, and rendered their verdict against the defendants.

One of the grounds for a motion for new trial is that the verdict is contrary to the evidence and weight of the evidence. This motion the court denied.

The rule is well settled in this State that:

"The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict,

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or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust."

"When the trial court concurs in the verdict rendered by a jury by denying the motion for a new trial, and there is evidence to support it, appellate court should refuse to disturb it, in the absence of any showing that the jurors must have been improperly influenced by considerations outside of the evidence." *Bexley v. State*, 59 Fla. 6, 51 South. Rep. 278.

Applying this rule to the testimony in this case the judgment must be affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

MARY W. EVINS, *Appellant*, v. THE GAINESVILLE NATIONAL BANK *et al.*, *Appellees*.

Opinion Filed June 26, 1920.

1. An execution issued on a judgment, called a writ of *fiert facias*, is a lien upon the personal property of the defendant in execution from the time such writ shall be delivered to the sheriff.
2. Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations are subject to levy and sale under execution.
3. A mortgage, in this State, is a specific lien upon property, and is not, of itself, a conveyance of the legal title.

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4. A mortgagee, either before or after default in payment, has no title by virtue of his mortgage to the mortgaged real estate. His interest is simply a specific lien for the security of the debt mentioned in the mortgage, and he can acquire the legal title as against the mortgagor, or his grantees, only by outbidding every other person at the foreclosure sale.
5. A mortgage of real estate is regarded as an accessory to the debt secured by the mortgage, and the assignment of the debt *ipso facto* carries with it the mortgage security.
6. As a general rule the lien of an execution operates upon and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate.
7. An execution is a lien only upon such property as the writ may be levied upon; and under the statute only "lands and tenements, goods and chattels, equities of redemption in real and personal property and stock in corporations" are subject to levy and sale under executions, therefore, a mortgage upon real estate, being merely a contract lien upon the land, is not subject to levy and consequently not subject to the lien of an execution.

An Appeal from the Circuit Court for Alachua County;
James T. Wills, Judge.

Order affirmed.

Thomas W. Fielding, for Appellant;

W. S. Broome and *Robert E. Davis*, for Appellees

WHITFIELD, J.—The bill of complaint herein in substance alleges that appellant here recovered a judgment against Ferdinand Bayer, upon which an execution was issued and placed in the hands of the sheriff, due nota

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tions thereof being made in the public records; that Bayer is insolvent and has no property upon which the execution may be levied; that subsequent to the issue and delivery to the sheriff of the execution, parties who were indebted to Bayer executed to him a mortgage deed upon described real estate, which mortgage it is alleged became subject to the indebtedness due the complainant as evidenced by her judgment and execution; that the mortgage deed was by Bayer assigned to the Gainesville National Bank, which "took the said mortgage deed from the said Ferdinand Bayer subject to the lien and indebtedness of oratrix against the said Ferdinand Bayer, as evidenced by her aforesaid judgment and execution mentioned in the first folio of this bill, and the said defendant, The Gainesville National Bank, a corporation, now holds the said mortgage deed in trust for oratrix to the extent of the sum of the indebtedness due to her by the said Ferdinand Bayer, as set forth in folio one of this bill."

The prayer is that the complainant be decreed to be "the owner of the mortgage deed" "to the extent of the sum of money, with interest and costs, that is due to her by her judgment and execution against the said Ferdinand Bayer. That a decree be rendered adjudging that the defendant, The Gainesville National Bank, a corporation, is a trustee for oratrix of the mortgage deed * to the extent of the sum of the indebtedness due to oratrix by the said Ferdinand Bayer; and that when the said mortgage deed becomes due and enforceable the said defendant, The Gainesville National Bank, a corporation, be required to enforce and collect same and pay to oratrix the sum of money due to her, with interest and costs thereon. That if the said defendant, The Gainesville National Bank, a corporation, should, for any cause,

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refuse or neglect to enforce the said mortgage deed when it becomes due and enforceable, or should neglect or refuse to pay oratrix the sum of money due to her under her said judgment and execution, that oratrix may have a decree authorizing her to proceed to enforce and collect said mortgage deed, by proper suit in her name, and sell the lands covered by said mortgage deed to pay her said judgment and execution. That oratrix may have all such further and any such other relief that she may be entitled to have in the premises, although she has not expressly prayed for such relief," etc.

A demurrer to the bill of complaint was sustained and the complainant appealed.

The question presented is whether a mortgage upon real estate is subject to the lien of an execution.

An execution issued on a judgment, called a writ of *feri facias*, is a lien upon the personal property of the defendant in execution from the time such writ shall be delivered to the sheriff. Pasco v. Harley, 73 Fla. 819, 75 South. Rep. 30; Love v. Williams, 4 Fla. 126; Hunt v. Pinegan, 11 Fla. 105; text 111; Kimball v. Jenkins, 11 Fla. 111, text 123.

Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution. § 1618, Gen. Stats. 1906.

A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession. § 2495, Gen. Stats. 1906; Hull v. Burr, 58 Fla. 432, 50 South. Rep. 754.

A mortgage, in this State, is a specific lien upon property, and is not, of itself, a conveyance of the legal title.

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McMahon v. Russell, 17 Fla. 698; Berlack v. Halle, 22 Fla. 236.

A mortgagee, either before or after default in payment, has no title by virtue of his mortgage to the mortgaged real estate. His interest is simply a specific lien for the security of the debt mentioned in the mortgage, and he can acquire the legal title as against the mortgagor, or his grantees, only by outbidding every other person at the foreclosure sale: *Jordan v. Sayre*, 29 Fla. 100, 10 South. Rep. 823; *Coe v. Finlayson*, 41 Fla. 169, 26 South. Rep. 704.

A mortgage of real estate is regarded as an accessory to the debt secured by the mortgage, and the assignment of the debt *ipso facto* carries with it the mortgage security. *Taylor v. American Nat. Bank of Pensacola, Fla.*, 63 Fla. 631, 57 South. Rep. 678.

As a general rule the lien of an execution operates upon and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate. 17 Cyc. 1052.

An execution is a lien only upon such property as the writ may be levied upon; and under the statute only "lands and tenements, goods and chattels, equities of redemption in real and personal property and stock in corporations" are subject to levy and sale under executions, therefore, a mortgage upon real estate, being merely a contract lien upon the land, is not subject to levy and consequently not subject to the lien of an execution. See 17 Cyc. 965; *Morris v. Barker*, 82 Ala. 272, 2 South. Rep. 335; *Freeman on Executions* (3rd. ed.) §§ 118, 184, 197; 10 R. C. L. 1265; 17 R. C. L. 134.

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As the appellant has no lien on the mortgage sought to be impounded, by virtue of her execution, and has set up no independent equity for the relief prayed, the order sustaining the demurrer to the bill of complaint was proper and is affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

HATTIE N. STOKELY, *et al.*, *Appellants*, v. MARY B. CONNOR, *et al.*, *Appellees*.

Opinion Filed June 26, 1920.

1. Matters not wholly irrelevant and immaterial should not be expunged from an answer in chancery either upon motion or upon exception for impertinence.
2. No alienee, grantee, assignee, or mortgagee is bound or affected by a judgment or decree in a suit commenced by or against the alienor, grantor, assignor or mortgagor subsequent to the alienation, grant, assignment or mortgage to which he is not a party.
3. The decree determining the rights and interests of the parties in a partition suit is not the final decree.
4. A new party defendant in a partition suit, brought in after the entry of a decree determining the rights and interests in the property of the respective parties then before the court, may set up matters of defense previously pleaded by his grantor who was an original defendant; when it appears that the conveyance was made prior to the commencement of the action though not recorded until after the action was begun; no special circumstances being shown to preclude such defense.

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5. Where a new pleading between the original parties is confined strictly to supplemental matter, the answer thereto should likewise be confined to such supplemental matter; but where a new party who is shown to have had an interest in the subject-matter of the suit before the suit was instituted, is brought into a cause he has a substantial right to be heard upon *all matters* which materially affect his property interest.

An Appeal from the Circuit Court for St. Johns County, George Couper Gibbs, Judge.

Order reversed.

Butler & Boyer, for Appellants;

W. W. Dewhurst, for Appellees.

REAVES, Circuit Judge.—This is the second appearance of this case in this court. The opinion in the former appeal sets out the bill and decree of partition in full, and reference is hereby made to said opinion for an extended statement of the case as it then stood. *Stokely v. Conner*, 69 Fla. 412, 68 South. Rep. 452.

After the former appeal complainants filed a petition in the Circuit Court for leave to file a supplemental bill, assigning as a reason therefor that, after the mandate had gone down from this court, and after commissioners had been appointed and had filed their report, and exceptions had been filed thereto by the defendants, "discovery was made of the filing in the public office for recording deeds in St. Johns County of a deed of conveyance of the lands sought to be partitioned by the defendant Harry M. Stokely, to one Lewis Shepard, Jr., dated A. D. 1905, but not filed for record until the 27th day of May, A. D.

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1914. Wherefore your petitioners are advised that it is necessary to bring the said Lewis Shepard, Jr., and his wife named Edna N. Shepard before this court as parties to this suit.”

An order was made granting this petition, whereupon a supplemental bill was filed against the Stokelys (except Harry M., who was dismissed by order of the Chancellor), and also against the new parties, viz: Shepard and his wife. Shepard is shown to be a resident of the State of Missouri, and the Court ordered that an order of publication be made against him and his wife, and that they be thereby brought “before the court to answer said supplemental bill.”

The subject matter of the suit is the partition of a tract of land in St. Johns County known as the Miranda Grant. The complainants claim that the property in question was originally granted to one Pedro Miranda, who deeded a one-half undivided interest to Joseph S. Sanchez, that the interest of Sanchez was subsequently sold under execution to one Conner, the ancestor of the complainants and under whom the complainants claim a one-half undivided interest; and the remaining one-half undivided interest was deeded by Pedro Miranda to his daughter Rufina Miranda, who inter-married with one Bisbee, by whom she had several children, and from these children as the heirs at law of their mother, the said Rufina Bisbee, the Shepards obtained title to and now own a one-half undivided interest. The Shepards, on the other hand, claim that the description of the land deeded by Miranda to Sanchez did not include any part of the Miranda Grant, but covered other lands; that the said Miranda conveyed a one-half undivided interest to his daughter Rufina, and died seized of the other one-half

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interest, which passed to his said daughter as his sole heir at law, and that the deeds from the Bisbee heirs conveyed to Hattie N. Stokely the whole of said property and not merely an undivided one-half interest therein as alleged by complainants. One of the Stokelys also set up some claim under a tax deed, and it was likewise claimed that the title of the Stokelys had been made secure by adverse possession. All these claims were decided against the Stokelys in the decree of partition, which decree was affirmed by this Court. The new defendants under the supplemental bill, viz. Shepard and his wife answered not only the supplemental matter but the original bill, and set up in their answer the same defenses which the Stokely's had previously set up, and which had been determined against them, and counsel for complainant moved to strike all that part of their answer which related to the subject matter of the original bill, and also excepted to the same portion of the answer, claiming it to be impertinent. The Chancellor overruled the motion to strike, but sustained the exceptions and the cause is now before this court upon an appeal from that order. No point is made in the argument as to whether this answer was properly attacked by motion or by exception, and we shall not discuss that question of practice, but, unless the matter expunged was wholly irrelevant and immaterial, it was improperly stricken upon motion or exception. *Ferro Concrete Co. v. Federal Terra Cotta Co.*, 79 Fla. 376, 84 South. Rep. 171; *Busch v. Baker*, 79 Fla. 113, 83 South. Rep. 704; *Law v. Taylor*, 63 Fla. 487, 58 South. Rep. 844.

The point we must decide, then, is whether the matter expunged from Shepard's answer was material or pertinent to his defense. The answer to this question depends

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upon whether Shepard, being brought into the case at the stage of the proceeding heretofore stated, had the right to raise by his answer, and to be heard before the court upon the same questions which had been raised by Stokely, his grantor, and decided against Stokely.

The Stokely-Shepard deed was made long before the bill was filed, but recorded long after the bill was filed. If this deed had been recorded before the bill was filed, and, if this action had been prosecuted to a final decree without making Shepard a party, it is clear that his rights would not have been affected by the action.

“No alienee, grantee, assignee or mortgagee is bound or affected by a judgment or decree in a suit commenced by or against the alienor, grantor, assignor, or mortgagor subsequent to the alienation, grant, assignment or mortgage to which he is not a party.” *Logan v. Stieff*, 36 Fla. 473, 18 South. Rep. 762; *Austin v. Hoxsie*, 44 Fla. 199, 32 South. Rep. 878; *Reddick v. Moffert*, 32 Fla. 409, 13 South. Rep. 894; *Henderson v. Chaires*, 25 Fla. 26, 6 South. Rep. 164.

If this rule is not to apply in this case, it must be because (1) Stokely failed to record his deed until after the action was begun or (2) because he was brought into the cause as a party before the final decree. The decree determining the rights and interests of the parties in a partition suit is not the final decree notwithstanding it finds and fixes the equities of the respective parties. *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 South. Rep. 722.

From the brief of counsel for appellees we quote as follows: “Shepard is entitled to his day in court. That is what he has been brought into this case for. It is

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admitted that, if he had not been made a party, the decree made in this cause, that complainants had title to one-half the grant and Hattie N. Stokely had title to the other half, would not have been binding on Shapard;" and again, "because of the rule of law that one not a party to a suit is not bound by a judgment or decree therein unless such party's rights accrued subsequent to the beginning of the suit, and so are bound by the *Lis Pendens*, the appellant, Lewis Shepard, Jr., has been brought into this suit before a final decree for the purpose of making the decree binding on him."

The incoherency of these statements lies in the fact that the decree, which counsel admits would not have bound Stokely had he not been brought into the case, had been rendered before he was brought in and it is not apparent how Stokely can be bound by what transpired in the progress of the suit before he was made a party, if he would not have been bound by the result of the suit had the same been concluded without making him a party. To bring a party into court and then refuse to hear his defense on the ground that the court had previously heard the same question raised by another defendant not representing the same interest is hardly giving one his day in court, either in name or in fact. Such procedure in effect says, you are entitled to be heard but the court refuses to hear you. It is argued, however, that the supplemental bill prays that complainants may have the benefit of all of the prior proceedings, and that the new defendant, by the prayer of the bill, and also by the wording of the court's order permitting the filing of the bill, was only required to answer the supplemental matter, and likewise that the practice in such cases requires only that the supplemental matter be answered. But this

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is not the ordinary case of a supplemental bill. In fact the subject matter of the bill appears to class it as rather an amendment than as a supplement. It brings to the attention of the court conditions that obtained before the action was instituted, and is not confined to matters transpiring thereafter, and it brings in new parties who appear to have owned an interest in the land in question before the action was instituted.

If the new pleading had been confined strictly to supplemental matter between the original parties it is clear that the answer should have been likewise confined to the supplemental matter; but where a new party who is shown to have had an interest in the subject matter of the suit before the suit was filed is brought into a cause it is obvious that to confine his answer to the new matter is to deprive him of the substantial right to be heard upon matters, which vitally affect his property interests, and no rule of procedure can be so applied as to adjudicate one's property rights without giving him a hearing. Shepard was either bound or he was not bound by the adjudication against Stokely, his grantor. If bound it was unnecessary to have made him a party to the suit, and, if not bound, he had the right, after being brought into the suit, to be heard upon the same matters of defense, so far as they were applicable to him, which Stokely had previously pleaded.

It is suggested that Harry M. Stokely has trifled with the court by withholding information of the Shepard deed and claiming that the title once held by him had been reconveyed to his mother, Hattie N. Stokely. This may be true, but Shepard's then existing rights can not be forfeited by Stokely's conduct.

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Upon the question of how the rights of Shepard were affected by his failure to record his deed until after the suit had been instituted counsel cites the case of *Smith v. Hodson*, 78 Mo. 180, 8 Atl. Rep. 276.

The following quotation from the opinion in that case fairly explains the holding:

"This plaintiff's deed, although given before, was not recorded till after, the commencement of the real action in which this defendant claimed title to the land—'and by Rev. St. c. 73, Sec. 8,' no conveyance * * * is effectual against any person except the grantor, his heirs, and devisees, and persons having actual notice thereof, unless the deed is recorded' as therein provided. Elizabeth Hodson was not one of those embraced within the exception named within the foregoing statutory provision. Nor is it claimed that she had notice of that conveyance prior to the commencement of her suit in which her title to the land was established. * * * This deed, then unrecorded, could not be effectual against the plaintiff in that suit, the defendant in this. It was recorded during the pendency of proceedings in which the plaintiff therein established her title to these premises; hence this plaintiff can be regarded in no other light than as a purchaser pendente lite.'

It will be noted that the effect of the statute requiring conveyances to be recorded as quoted in this opinion is much broader than our statute. The Florida statute, Sec. 2480, General Statutes, 1906, provides that no conveyance shall be good "against creditors of subsequent purchasers for valuable consideration, and without notice unless the same be recorded according to law." The complainants in this cause are neither purchasers from nor

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creditors of Stokely, Shepard's grantor. Moreover we are not advised whether or not a notice of the pending suit had been filed and recorded as required by Sec. 1649 of the General Statutes; without which "no suit * * * shall operate as a *Lis Pendens* as to any property involved therein." *Cole v. Lee*, 57 Fla. 387, 49 South. Rep. 1017; *Perkins v. Ogilvie*, 140 Ky. 412, 131 S. W. Rep. 200; *Snow v. Russell*, 94 Mo. 322, 47 Atl. Rep. 536; 25 Cyc. 1465; *Penn. Naval Stores Co. v. Cox*, 57 Fla. 505, 49 South. Rep. 191.

The record, as it is brought here, does not affirmatively show that Shepard would have been concluded by the final decree if he had not been made a party; counsel for the respective parties seem to agree that he would not and we must assume that he would not; and if not, then he certainly has the right to be heard upon all questions which materially affect his interest, including the question whether the conveyance under which he claims carries the whole or only a one-half undivided interest in the said land.

Complainants complain in their brief, of the order of the court dismissing Harry M. Stokely and overruling exceptions for insufficiency to the answers of Wells R. Stokely and Hattie N. Stokely, to the supplemental bill, but in as much as no assignment of error is predicated thereon we do not consider whether such complaint is well founded or not.

The order sustaining the exceptions to the answer of Lewis Shepard, Jr., should be reversed.

PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court

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as its opinion, it is considered, ordered and adjudged by the court that the order herein be and the same is hereby reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

W. H. NEISEL, *Plaintiff in Error*, v. D. W. MORAN, AS SHERIFF OF DADE COUNTY, *Defendant in Error*.

Opinion Filed August 21, 1919.

Petition for Rehearing Granted March 25, 1920.

Opinion on Rehearing Filed June 28, 1920.

1. The State Constitution does not require that proposed amendments thereto shall contain express provisions for their submission to the electors of the State for approval or rejection.
2. Those who assert the unconstitutionality of a statute have the burden of showing that beyond all reasonable doubt the statute inevitably conflicts with some designated provision of the Constitution.
3. A statute cannot be judicially declared beyond the power of the Legislature to enact, unless some provision of the Constitution which is in conflict with it can be specifically pointed to.
4. The State Legislature has plenary law-making power subject only to the limitations imposed by the State and Federal Constitutions, and may enact any anticipatory statutes that are not forbidden by such Constitutions.

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5. Conflicts between a statute and organic law do not arise until the statute becomes operative.
6. Constitutional provisions are designed to effectuate practical government regulated by law; and they should be so interpreted as to accomplish and not to defeat their purpose or to lessen their efficiency.
7. Original Article XIX of the State Constitution was superseded January 1st, 1919, by amended Article XIX, which had been adopted by the electors of the State at the General Election held November 5, 1918, to "go into effect on the first day of January, A. D. 1919;" and Original Article XIX did not forbid the enactment of the statute designated as Chapter 7736, entitled An Act to make effective the Nineteenth Article of the Constitution of this State, as amended at the General Election held November 5th, nineteen hundred and eighteen," etc., enacted at the Special Session held in November and December of 1918, and approved December 7, 1918, which statute by virtue of Section 18 of Article III of the State Constitution "specifically provided in such law," that it should "go into effect on the first day of January, A. D. 1919," the day amended Article XIX became effective as organic law.

Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Order affirmed.

R. B. Gautier and *Bart A. Riley*, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

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STATEMENT.

Neisel was convicted in the Criminal Court of Record of Dade County upon an information charging in one count that on March 21, 1919, he had "in his possession, custody and control in Dade County, State of Florida, certain alcoholic and intoxicating liquors and beverages, to-wit, ninety-seven (97) quarts of whiskey," and in another count that on March 21, 1919, in Dade County, Florida, he "did then and there transport, cause to be transported and was then and there concerned in the transportation from a point in the State of Florida, to-wit, some point located on the Florida East Coast Railroad, running from Jacksonville, Florida, to Miami, Florida, certain alcoholic and intoxicating liquors and beverages, to-wit, ninety-seven (97) quarts of spirituous liquor, commonly called whiskey," etc., contrary to the statute. He sought unsuccessfully a discharge from custody by *habeas corpus* proceedings in the Circuit Court, upon the ground that the statute on which the conviction is predicated, is unconstitutional and void. The statute is Chapter 7736, approved December 7, 1918, Acts of an extra session of the Legislature convened by the Governor and held beginning November 25, 1918. A writ of error was duly allowed and taken to the order remanding the petitioner to the custody of the sheriff by virtue of the conviction above stated.

The provisions of the Constitution and of the statute to be considered are as follows:

Amendments to the Constitution.

"Either branch of the Legislature, at a regular session thereof, may propose amendments to this Constitution;

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and if the same be agreed to by three-fifths of all the members elected to each house, such proposed amendments shall be entered upon their respective journals with the yeas and nays, and published in one newspaper in each county where a newspaper is published, for three months immediately preceding the next general election of representatives, at which election the same shall be submitted to the electors of the State, for approval or rejection. If a majority of the electors voting upon the amendments at such election shall adopt the amendments the same shall become a part of the Constitution. The proposed amendments shall be so submitted as to enable the electors to vote on each amendment separately. Sec. 1, Article XVII, Constitution of 1885.

Original Article XIX of the Constitution is as follows:

“LOCAL OPTION.

“Section 1. The board of county commissioners of each county in the State, not oftener than once in every two years, upon the application of one-fourth of the registered voters of any county, shall call and provide for an election in the county in which application is made, to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein, the question to be determined by a majority vote of those voting at the election called under this section, which election shall be conducted in the manner prescribed by law for holding general elections; provided, that intoxicating liquors, either spirituous, vinous, or malt, shall not be sold in any election district in which a majority vote was cast against the same at the said election. Elections under this section shall be held within sixty days from the time of pre-

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senting said application, but if any such election should thereby take place within sixty days of any State or National election, it shall be held within sixty days after any such State or National election.

“Section 2. The Legislature shall provide necessary laws to carry out and enforce the provisions of section one of this Article.”

The Amendment to Article XIX is:

“Senate Joint Resolution No. 4.

“A Joint Resolution Proposed Amendment to the Constitution of Florida.

“Be It Resolved by the Legislature of the State of Florida:

“That Article XIX of the Constitution of the State of Florida, be, and the same is hereby, amended so as to read as follows:

“Article XIX, Section 1. The manufacture, sale, barter or exchange of all alcoholic or intoxicating liquors and beverages, whether spirituous, vinous or malt, are hereby forever prohibited in the State of Florida, except alcohol for medical, scientific or mechanical purposes, and wine for sacramental purposes; the sale of which alcohol and wine for the purposes aforesaid, shall be regulated by law.

“Sec. 2. The Legislature shall enact suitable laws for the enforcement of the provisions of this article.

“Sec. 3. This article shall go into effect on the first day of January, A. D. 1919.

“Approved April 18, 1917.”

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The above amendment to the Constitution was adopted by the electors of the State at the General Election held November 5, 1918.

“CHAPTER 7736, ACTS OF 1918.

“An Act to Make Effective the Nineteenth Article of the Constitution of this State, as Amended at the General Election Held November Fifth, Nineteen Hundred and Eighteen, and to Prohibit the Manufacture, Sale, Barter or Exchange, the Transportation into this State, or from one Point to Another Point Within the State, and the Possession of Alcoholic or Other Intoxicating Liquors or Beverages,” etc.

“Be It Enacted by the Legislature of the State of Florida :

“Section 1. That it shall be unlawful for any person, association of persons, or corporation, or any agent or employee of any person, association of persons or corporation, to manufacture, sell, barter or exchange, or cause to be manufactured, sold, bartered or exchanged, or in anywise to be concerned in the manufacture, sale, barter or exchange, or to transport, cause to be transported, or in anywise be concerned in the transportation, from any point in this State to any other point in this State, or to any point in this State from any point without the State whether in another State, Territory, possession of the United States, or foreign country, any alcoholic or intoxicating liquors or beverages, whether spirituous, vinous or malt, except as is hereinafter provided.

“Sec. 3. That it shall be unlawful for any person, association of persons, or corporation, or any agent or employee of any person, association of persons, or corpora-

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tion, to have in his, her, their, or its, possession, custody or control, in this State, any alcoholic or intoxicating liquors or beverages, except as is hereinafter provided.

“Sec. 5. That nothing contained in this Act shall be construed to make unlawful, the manufacture, sale, barter or exchange, or to cause to be manufactured, sold, bartered or exchanged, or to be in anywise concerned in the manufacture, sale, barter or exchange, or to transport, cause to be transported, or to be in anywise concerned in the transportation, from any point in this State to any other point in this State, * * * . And nothing contained in this Act shall be construed to make it unlawful for any person over the age of twenty-one years to possess, have in custody or control, in such person's bona fide residence, for the personal use of himself, or herself, and family, and not to be disposed of to any other person in any way, not exceeding four quarts of distilled alcoholic or intoxicating liquors or beverages and twenty quarts of malt or fermented alcoholic or intoxicating liquors or beverages, either or both, but this shall not be construed to permit any such person to possess, have in custody or control, more than the maximum quantity of the particular class of liquors here mentioned. * * * .

“Sec. 18. That, when not otherwise herein specifically provided, any person, association of persons, or corporation, and any agent or employee of any person, association of persons, or corporation, who shall violate any of the foregoing provisions of this Act herein declared to be unlawful, or to be a misdemeanor, or which imposes a duty upon any officer or any person, shall upon conviction be deemed guilty of a misdemeanor and punished by a fine not exceeding Five Hundred Dollars, or by imprisonment

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in the County Jail not exceeding six months, or by both such fine and imprisonment; * * *

“Sec. 22. That, if for any reason, any Section or provision of this Act shall be adjudged unconstitutional, or otherwise inoperative, such fact shall not be held to affect any other section or provision in this Act contained, but the same shall remain in full force and effect as if the section or provision adjudged unconstitutional or inoperative had not originally been incorporated in this Act.

“Sec. 24. This Act shall go into effect the first day of January, A. D. 1919.

“Approved December 7, 1918.”

WHITFIELD. J. (after stating the facts):

There is a preliminary contention that the amendment to Article XIX of the State Constitution proposed by the legislature in 1917, and adopted at the polls November 5, 1918, to “go into effect” January 1, 1919, is invalid because it was not proposed, submitted and ratified in accordance with Article XVII of the State Constitution, in that the legislature in proposing the amendment to Article XIX did not “*determine upon the submission of the amendment to the people for ratification or rejection.*”

The Constitution requires that proposed amendments to the Constitution by the legislature shall “be agreed to by three-fifths of all the members elected to each house,” that “such proposed amendments shall be entered upon their respective journals with the yeas and nays,” and that “the same shall be submitted to the electors of the State, for approval or rejection.”

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Whether previous proposed amendments to the Constitution have or have not in terms provided specifically for their submission to the electors of the State for approval or rejection, is immaterial here, as the Constitution does not require the proposed amendments to contain express provisions for their submission to the electors. The general election law makes provision for appropriately placing any proposed amendments to the Constitution on the official ballots to be cast at general elections; and the proper officers of the State and counties have authority and duty under the general election laws to submit duly proposed amendments to the Constitution to the electors of the State for approval or rejection. See Sec. 21, Art. IV; Sec. 1, Art. XVII, Const. 1885; Secs. 74, 79, 218, 219 as amended in 1907; Secs. 220, 230, 242, Gen. Stats. 1906, Chap. 5405, Acts of 1905; State *ex rel.* Adams v. Herried, 10 S. D. 109, 72 N. W. Rep. 93; Crawford v. Gilchrist, 64 Fla. 41, 59 South. Rep. 963, Ann. Cas. 1914B, 916. Amended Article XIX was legally proposed, submitted and adopted as a part of the Constitution.

In *ex parte* Francis, 76 Fla. 304, 79 South. Rep. 753, it was held that in providing for prohibitions of the sale of intoxicating liquors in counties by local option elections, original Article XIX of the Constitution *by implication* restrained the police power of the State and *forbad legislation regulating the possession and the transportation* of such liquors in counties where *the sale thereof was unlawful*. But this construction was not put upon amended Article XIX which forbids *the manufacture, sale, barter or exchange* of intoxicating liquors; and the statute now considered insofar as it regulates the possession of intoxicating liquors, was sustained as a valid exercise of the police power, though the validity of the statute with reference to the time of its enactment was

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not then questioned. *Marasso v. VanPelt*, 77 Fla. 432, 81 South. Rep. 529.

It is contended that the statute is void because it *was passed* while original Article XIX was in force, though the statute did not take effect or become operative until original Article XIX had been superseded by amended Article XIX, with which amended article the statute does not conflict.

Those who assert the unconstitutionality of a statute have the burden of showing that beyond all reasonable doubt the statute inevitably conflicts with some designated provision of the Constitution. 12 C. J. 797; *Peninsular Casualty Co. v. State*, 68 Fla. 411; 67 South. Rep. 165; *State ex rel. Simpson v. Ackerly*, 69 Fla. 23, 67 South. Rep. 232; *State ex rel. Clarkson v. Phillips*, 70 Fla. 340, 70 South. Rep. 367; *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 South. Rep. 769; *Pinellas Park Drainage Dist. v. Kessler*, 69 Fla. 558, 68 South Rep. 668; *Lainhart v. Catts*, 73 Fla. 735, 75 South. Rep. 47; *Anderson v. City of Ocala*, 67 Fla. 204, 64 South. Rep. 775; *ex parte Pricha*, 70 Fla. 265, 70 South. Rep. 406; *County Com'rs of Duval County v. City of Jacksonville*, 26 Fla. 196, 18 South. Rep. 339; *Peninsular Industrial Ins. Co. v. State*, 61 Fla. 376, 55 South. Rep. 398; *Lindsey v. National Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. Rep. 337.

A statute cannot be judicially declared beyond the power of the Legislature to enact, unless some provision of the Constitution which is in conflict with it can be specifically pointed to. *Cleveland v. City of Watertown*, 222 N. Y. 159, 118 N. E. Rep. 500; *Wooten v. State*, 24 Fla. 335, text 345, 5 South. Rep. 39; 120 N. E. Rep. 19.

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The Federal Constitution provides that "all legislative powers *herein granted* shall be vested in' the Congress. The State Constitution provides that "the legislative authority of this State shall be vested in" the Legislature. Differing from the Federal Constitution in this particular, the State Constitution does not *grant* particular law-making powers to the legislative body. The State Constitution merely imposes specified limitations upon the general law-making power of the State that is vested in the Legislature; and those limitations do not *forbid the passage* of statutes of the nature here considered. 120 N. E. Rep. 19.

The State Legislature has plenary law-making power subject only to the limitations imposed by the State and Federal Constitutions, and may enact any anticipatory statutes that are not forbidden by such Constitutions. The State Constitution expressly provides for the enactment of statutes to take effect after their passage and approval and after the final adjournment of the session of the Legislature at which they were enacted. Anticipatory statutes are not forbidden; nor are they contrary to the letter or to the spirit of the State Constitution; but the enactment of statutes to take effect at times subsequent to their enactment is expressly contemplated by the Constitution. Under Section 18 of Article III of the State Constitution, if this statute had not expressly provided that it should take effect on January 1, 1919, it would not have taken effect until some day in February, 1919, sixty days after the final adjournment of the session of the Legislature at which it was enacted, and until amended Article XIX had been in force more than a month.

If the Legislature had power to enact this statute after amended Article XIX *took effect* January 1, 1919, to make

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the Article effective in its enforcement, as the amendment expressly provides, no reason is perceived why the same Legislature, under its general law-making power, could not legally enact the statute in December, 1918, to take effect January 1st, 1919, concurrently with amended Article XIX, which had already on November 5, 1918, been adopted at the polls to take effect inevitably on January 1, 1919. The Legislature that enacted the statute was the same body that was in commission when and after amended Article XIX became effective; and the amended Article commands the Legislature to enact suitable laws for the enforcement of the provisions of the Article as amended. The enactment merely anticipated the effectiveness of the command of amended Article XIX; and in doing so violated no provision of organic law. Statutes that do not violate the Constitution are the law of the land and should be made effective as such. Otherwise the Legislature as the law-making power would not be a co-ordinate department of the government.

When Chapter 7736 was passed and approved December 7, 1918, the amendment to Article XIX of the Constitution had already been adopted November 5, 1918, to take effect January 1, 1919, therefore the cases cited for plaintiff in error in which amendments to the Constitution were *adopted after* unconstitutional statutes had been passed and *made operative*, are not authority for holding that the statute here approved December 7, 1918, to take effect January 1, 1919, is void because in conflict with Article XIX before its amendment, which amendment, though adopted November 5, 1918, did not take effect till January 1, 1919. The Constitution did not *forbid the passage* of statutes of this character as it does of certain special or local laws (Sec. 20, Art. III); and the Constitution expressly provides that enactments may be

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come laws as stated therein, and that such laws may *take effect* or *become operative* at future times as specified in the laws. Secs. 18 and 28, Art. III.

The statute did not take effect and was not in force *at any time* while original Article XIX was a part of the organic law. That is the difference between this case and others cited in argument. The validity of the statute is to be determined by the organic provisions in force at the time the statute *took effect* or *became operative*, and not at the time of its *passage*; and as the amendment to Article XIX became effective and operative concurrently with the statute, the provisions of original Article XIX do not affect the validity of the statute. The status of this statute is as though it had been enacted, approved and made effective or operative January 1, 1919, the day amended Article XIX took effect, entirely superseding original Article XIX of the Constitution. Conflicts between a statute and organic law do not arise until the statute becomes operative. *Sammes v. Bennett*, 32 Fla. 458, 460, 56 Fla. 107; 64 Fla. 154; 53 Fla. 647; 1 Mich. 369; 159 N. Y. 118.

As the amendment to Article XIX had been adopted by the electors of the State November 5, 1918, to take effect January 1, 1919, it was inevitable that it would be effective at that time; and as the amendment required the enactment of "suitable laws" for its enforcement, and as the regular session of the Legislature would not under the Constitution convene till April, 1919, it was within the law-making power of the Legislature at the extra session in December, 1918, to enact "suitable laws" to enforce the provisions of Article XIX as amended when it took effect January 1, 1919. The statute here assailed approved December 7, 1918, is a suitable law to enforce the

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provisions of Article XIX as amended, and by the terms of the statute it is enacted "to make effective the Nineteenth Article of the Constitution of this State, as amended at the General Election held November fifth, nineteen hundred and eighteen," etc., and by its express provisions it did not take effect till January 1, 1919, when the amendment to Article XIX itself became effective. Its *passage* was not forbidden by organic law; and its effectiveness conforms to the requirements of Article XIX of the Constitution as amended. See *Pratt v. Allen*, 13 Conn. 119.

The Constitution vests the general law-making power of the State in the Legislature, and expressly authorizes the enactment of laws to take effect or to become operative at a time subsequent to their enactment and approval. Sec. 18, Art. III. See also *Barbour v. State*, 249 U. S. 454, 39 Sup. Ct. Rep. 316.

This is not a case where a *subsequently adopted* amendment to a Constitution is ineffectual to give validity to a previously enacted void statute which purported to take effect before the Constitution is amended and is not referred to in or validated by the amendment to the Constitution (See 12 C. J. 727); but it is a case where a constitutional amendment had been duly adopted by the electors of the State to take effect inevitably at a future fixed date, and between the adoption of the amendment to the Constitution by the electors and the date it became effective to entirely supersede the former Article XIX of the Constitution, the Legislature without violating any provision of the Constitution enacted a suitable law to enforce the provisions of the amendment to the Constitution, the laws to *take effect concurrently with the amendment to the Constitution*. See *Correllis v. State*,

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78 Fla. 44, 82 South. Rep. 601; *Morasso v. Van Pelt*, 77 Fla. 432, 81 South. Rep. 529. Chapter 7736 by its express terms could not have been effective at any moment of time when original Article XIX was in force, so there could be no conflict between original Article XIX and Chapter 7736. *Larrabee v. Talbot*, 5 Gill (Md.) 426, 46 Am. Dec. 637; 36 Cyc. 1192; 15 L. R. A. (N. S.) 134, text 138.

In this case the amendment to Article XIX contemplated the enactment of regulations to enforce its provisions when the Article became effective, and the passage of such regulations before the organic amendment took effect, the enactment to *take effect* concurrently with the organic amendment, does not render the statute void, even though it may have been in conflict with the original Article XIX, if the statute had been *made effective or operative* before the amendment to Article XIX took effect.

In *Reade v. City of Durham*, 173 N. C. 668, 92 S. E. Rep. 712, the statute was sustained because it *was passed and became effective before* the constitutional amendment became operative under which amendment the statute would have been invalid. The statute took effect the day it was passed.

In *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 South. Rep. 867, the amendment to the Constitution had not been adopted when the statute was passed and *it was held* that the constitution *forbade the passage* of the statute at the time it was enacted.

The recently adopted amendment to the Federal Constitution, known as Article XVIII, which is to take effect January 16th, 1920, prohibiting the manufacture, sale or transportation of intoxicating liquors in the United

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States for beverage purposes, is an added and not a substituted Article; and, having been adopted by three-fourths of the States, it may be regarded as a part of the Federal Constitution before it becomes operative, making the enactment of anticipatory statutes for enforcing the Article proper, such statutes to take effect and become operative concurrently with the added Article.

Amended Article XIX of the Florida Constitution is not an added Article. It is a substituted Article to take the place of original Article XIX of the Constitution. This substitution took effect January 1, 1919, by the terms of the amended Article itself. See *Correllis v. State*, 78 Fla. 44, 82 South. Rep. 601.

Even though original Article XIX was in effect as organic law until January 1, 1919, yet it did not limit the power or the duty of the legislature in December, 1918, to enact anticipatory statutes to enforce amended Article XIX that had already been adopted at the polls in November, 1918, to take effect January 1, 1919. Original Article XIX was a limitation upon the law-making power of the legislature only as to prohibitions of the sale of intoxicating liquors. Its provisions were not a limitation upon the power of the legislature to enact anticipatory statutes to meet the requirements of an amendment to Article XIX that had been adopted to inevitably become a substitute for original Article XIX; and the statute here considered, which by its express terms took effect January 1, 1919, was not in conflict with original Article XIX, since the statute was not operative at any time when original Article XIX was in force.

The added Article XVIII of the Federal Constitution is a grant of lawmaking power to the Congress, without

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which Congress has no general authority (not covered by the granted war powers and interstate and foreign commerce powers of Congress) to enact laws regulating the manufacture or sale of intoxicating liquors in the states. But the State legislature has plenary power to enact such laws, except where restrained by the constitution; and the constitution did not restrain or limit the power of the legislature to enact the statute here involved, to take effect concurrently with amended Article XIX on January 1, 1919, for the expressed purpose of enforcing the provisions of amended Article XIX, as contemplated by the amendment showing the will of the electors of the State expressed pursuant to the constitution. The statute is not palpably arbitrary or oppressive. See 238 U. S. 446; 225 U. S. 623.

Constitutional provisions are designed to effectuate practical government regulated by law; and they should be so interpreted as to accomplish and not to defeat their purposes or to lessen their efficiency. Article XIX as amended commands legislative enactments to enforce its provisions; and to hold that though the amended Article had been duly adopted by the people to take effect later, the commanded regulations could not legally *be enacted* until *after* the amendment became effective, when the provisions of organic law do not require such a holding, and when the legislature had full power to enact such laws independently of the organic command, would make the courts administrators of technical formulae developed by construction, to the sacrifice of substance and to the disregard of the manifest intent and purpose of organic provisions as adopted by the people of the State, thereby rendering government impotent to effectuate its own purposes as expressed by the people whose government it is,

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and who have acted in full accord with the requirements of organic law. Even if the validity of the statute be considered doubtful, all doubts should be resolved in favor of the constitutionality of the statute. And even if it be supposed that the statute is contrary to the spirit of the constitution it cannot for that reason be declared to be void. *Wooten v. State*, 24 Fla. 335, text 345, 5 South. Rept. 39; 6 R. C. L. 104; 12 C. J. 752; 120 N. E. Rep. 19. The courts do not regulate the policy of statutory enactments. See 67 Fla. 370. 1 Lewis Suth. Stat. Construction Sec. 85 and authorities cited.

The guarantees of life, liberty and property contained in the Constitution are not absolute. All private rights are enjoyed by individuals as members of the public constituting organized society; and such rights are subject to the paramount right of the State to modify them to conserve the public welfare for *salus populi est suprema lex*. See 70 N. J. Eq. 895, 65 Atl. Rep. 489, 14 L. R. A. (N. S.) 197; 10 Ann. Cas. 116, 118 A. S. R. 754; 12 C. J. 948. Restrictions upon private rights are compensated for by the individuals sharing in the general benefits accruing from the regulations limiting private rights. *Gardner v. Michigan*, 199 U. S. 325.

The possession of intoxicating liquors may be regulated as a means of preventing the unlawful acquisition of it. *Crane v. Campbell, Sheriff*, 245 U. S. 304, 38 Sup. Ct. Rep. 98; *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. Rep. 143; *Gray v. Kimball*, 42 Maine 299.

The constitutional right to acquire, possess and protect property relates to such subjects of property as persons may acquire and have in possession under lawful regulations to conserve the general welfare; and such regulations may limit the subjects of property as to kind

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or quantity, either or both, or as to the manner or place of possession, when expedient for the common good, and when due process and equal protection of the laws are not denied to any person by the regulations. The necessity and wisdom of statutory regulation are not reviewed by the courts. See 137 U. S. 86; 199 U. S. 306, 324; 12 C. J. 753; 120, N. E. Rep. 19.

By forbidding the manufacture, sale, barter or exchange of intoxicating liquors and beverages, and by commanding the legislature to enact suitable laws to enforce the prohibitions, the Constitution not only does not forbid statutory regulations of the possession of such liquors, but it contemplates their enactment as being suitable to enforce the prescribed prohibitions. *Marasso v. VanFelt*, 77 Fla. 432, 81 South. Rep. 529; 245 U. S. 304.

The plaintiff in error has not shown beyond reasonable doubt that the statute under which he was convicted violates some designated provision of the Constitution, and the order remanding him to custody should be affirmed.

WEST, J., concurs.

ELLIS, J., concurring.

It is conceded that if Chapter 7736, Laws of 1918, had been intended to go into effect before January 1st, 1919, the Act would have been void because of the existence of Article XIX of the Constitution of 1885, which inhibited the legislature from enacting prohibitory legislation as to the sale of intoxicating liquors. See *ex parte Pricha*, 70 Fla. 265.

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The question then is: What gave validity to the Act, if it is valid? The amendment to Article XIX, which was adopted by the people in November, 1918, at the general election, held about one month prior to the passage of Chapter 7736, completely removed the limitation upon the legislature as to the enactment of legislation prohibiting the sale of intoxicating liquors in this State, but the amendment provided that it should become effective on the first day of January, A. D. 1919. If the amendment was not a *part of the Constitution* until that date, then the legislature had no power prior to that date to bring into existence an Act dealing with the subject of the prohibition of the sale of intoxicating liquors and depend upon an amendment to the Constitution to give vitality to the act. The passage through the legislature of such an Act was without authority. The legislature had no power to deal with the subject. It was prohibited by the terms of the Constitution from doing so. Such an Act would have been void. It would have been nothing more than a blank piece of paper. See *Cooley Const. Lim.* 188; *Mining Co. v. Secretary of State*, 82 Mich. 573.

An amendment to the Constitution granting power to the legislature by removing a limitation does not have a retroactive effect and give life to a void act of the legislature, which passed that body when the limitation or inhibition rested upon it. See *Cooley Const. Lim. supra*.

If, however, the amendment to Article XIX, which was adopted in November, 1918, became upon its adoption a *part of the Constitution*, then the legislature which assembled under the new Constitution, that is to say, the Constitution as amended, derived its powers from

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the people under that instrument, although there still rested upon the law-making body an inhibition by enactment to presently deal with the subject of the prohibition of the sale of intoxicants. There was no express or implied inhibition, however, to enact a statute to become effective at such time in the future as the amendment specified. If the amendment at its adoption became a part of the Constitution, then the legislature had power to enact laws upon the subject with which the amendment dealt, provided such laws were consistent with the provisions of the amendment. In this matter the only restriction being that such laws should not take effect until January 1st, 1919.

Section 1 of Article XVII of the Constitution provides that: "If a majority of the electors voting upon the amendments at such election shall adopt the amendment the same shall become a *part* of the Constitution." This clause has been construed to mean that immediately upon the adoption of an amendment it became operative. See Advisory Opinion, 34 Fla. 500.

Other courts have so construed similar provisions of the Constitutions of other States.

There was no proposition to amend Article XVII. An implied repeal or amendment of the Constitution is not favored. The old and the new provisions of the organic law should stand and operate together if it can be done without contravening the intent of the law-making power (the people) as expressed in the latter provision. See Board Public Instruction Polk County v. County Commrs. Polk County, 58 Fla. 391; Mugge v. Warnell Lumber & Veneer Co., 58 Fla. 318.

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While the amendment became a part of the Constitution when it was adopted, its effect upon the manufacture, sale, barter or exchange of alcoholic or intoxicating liquors, was postponed until January 1st, 1919, but the inhibition which rested upon the Legislature under the old article of the Constitution to deal with the subject of prohibition at all was removed to the extent that such legislation might be enacted whose operation was intended to run concurrently with the period during which the amendment was to be effective. If such was not the effect of the amendment, then the quoted words of Section 1, Article XVII, are meaningless so far as this amendment is concerned, or the amendment by its terms was removed from the influence of that provision of the Constitution.

To maintain either position is to assert that the phrase "shall go into effect" is synonymous with the phrase "shall become a part of the Constitution." But such is not the case because, while the amendment became at its adoption a part of the organic law its inhibition upon the sale of intoxicating liquors became operative at a later date. Section 2 of the amendment which provides that "The Legislature shall enact suitable laws for the enforcement of the provisions of this article" was a command to legislate upon the subject, but it conferred no power. The power to enact suitable laws to enforce the intention of the people as expressed in the amendment became vested in the Legislature upon the amendment becoming a part of the Constitution; that is to say, at its adoption, the limitation being that such legislation should not go into effect before January 1st, 1919.

BROWNE, C. J., dissenting. TAYLOR, J., concurring in the dissent.

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I dissent from the decision, and from both opinions in this case. Three of the Justices concurred in the conclusion, but two seem to dissent from the premises of each other, although they reach the same conclusion.

Mr. Justice WHITFIELD, following the decision in the case of *Correlis v. State*, decided at the June, 1919, term of this court, takes the position that the amendment to Article XIX did not go into effect or become a part of the Constitution until January 1, 1919, but that the Legislature had authority to pass the Act, notwithstanding the prohibition contained in Art. XIX that was in force prior to January 1, 1919.

Mr. Justice ELLIS does not concur in this view. He says, "If the amendment was not a *part of the Constitution* until that date, then the Legislature had no power prior to that date to bring into existence an Act dealing with the subject of the prohibition of the sale of intoxicating liquors and depend upon an amendment to the Constitution to give validity to the Act. The passage through the Legislature of such an Act was without authority. The Legislature had no power to deal with the subject. It was prohibited by the terms of the Constitution from doing so. Such an Act would have been void. It would have been nothing more than a blank piece of paper. See *Cooley Const. Lim.* 188; *Mining Co. v. The Secretary of State*, 82 Mich. 573."

So far, I quite concur with Mr. Justice ELLIS; but when he contends that the amended Article XIX "became a part of the Constitution when it was adopted" we part company, and I am forced to do so by the decision of this court in the *Correlis* case, *supra*.

Mr. Justice ELLIS cites the Advisory Opinion to the Governor, 34 Fla. 500, 16 South. Rep. 410, as authority

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for holding that this amendment became a part of the Constitution immediately upon its adoption in the November election.

There can be no controversy about the soundness of that proposition as to amendments generally, but I think it equally uncontrovertible that the Constitution may be so amended as to take any part of it out of the operation of any other part. An amendment that provides that it shall not go into effect until some date subsequent to its adoption by the vote of the majority of the electors, is a positive constitutional enactment that it *shall not become a part of the Constitution immediately upon its adoption.*

Such was the decision of this court in the Correlis case. There we said, "This of itself rescued the amendment from the provision of Art. XVII by which amendments to the Constitution become effective upon receiving the approving majority of the votes of the electors."

This view finds support in the text books and reports. Thus, "The time an amendment becomes operative may be fixed by the Constitution or *by the terms of the amendment itself.*" 12 Corpus Juris, 721. (The italics are mine).

In *Reade v. City of Durham*, — N. C. —, 92 S. E. Rep. 712, the court said, "The time when the amendments should become effective is as much a part of the submission as the amendments themselves. No one contends that if the provision as to the time the amendments should take effect had been submitted as a part of the amendments and voted on by the people it would be operative."

"The general rule that Constitutions and Constitutional Amendments take effect upon their ratification by the people, unless otherwise provided in the instrument it-

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self or the resolutions submitting them, applies to sovereign states possessing within themselves the power to make and unmake Constitutions." *Farrar v. St. Louis & S. F. R. Co.*, 149 Mo. App. Rep. 188, 130 S. W. Rep. 373.

The Ohio Constitution had a provision similar to ours that when an amendment is adopted by the electors it "shall become a part of the Constitution." A resolution of the Ohio Legislature proposing an amendment to the Constitution provided that if a majority of the electors voting on the amendment should adopt the same, it should become part of the Constitution on and after the first day of January, 1914.

This resolution was not submitted to a vote of the people with the amendment. For that reason it was held that the mere passage by the Legislature of such a resolution could not prevent the operation of the constitutional provision that amendments should become part of the Constitution upon their adoption by the electors; but the court said "The Constitution is positive in its terms and provides that the amendment shall become a part of the Constitution when a majority of the electors voting on the same shall adopt it. The time when an amendment is to become effective can be submitted to the electors, as in the case of the amendments of 1912, wherein it was expressly provided when they should go into effect. * * * There is nothing in the Constitution of this State postponing the operation of an amendment, and it cannot be postponed unless the proposition to postpone is submitted to the electors and is adopted by a majority of those voting thereon." *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N. E. Rep. 29. This is entirely in accord with our position in the *Correlis* case.

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An amendment to a Constitution cannot become effective without being a part of the Constitution, and conversely it cannot be a part of it, without taking effect. And this is peculiarly so, where there would be two conflicting provisions, both parts of the Constitution at one and the same time.

The terms "a part of," "be effective," "take effect," "be in operation," "in force" are used interchangeably by text writers and in opinions by Justices of Courts of last resort, in relation to the effect of constitutional enactments upon legislative action.

Both opinions in this case concede that prior to January 1, 1919, the old Art. XIX was in force as part of the Constitution. This article was an inhibition on the Legislature to enact "actual or practical prohibition" for the entire State. *Ex parte Lewinsky*, 66 Fla. 324, 63 South. Rep. 577; *Ex parte Pricha*, 70 Fla. 265, 70 South. Rep. 406. In the *Pricha* case this court said, "Unquestionably but for the provision contained in Art. XIX of the State Constitution, the Legislature would have the power to prohibit and suppress the traffic in intoxicating liquors."

Article XIX, as amended, prohibits absolutely the "manufacture, sale, barter or exchange" of intoxicating liquors and beverages.

The original Article XIX placed certain limitations upon the power of the Legislature; the amended article removed them. They were repugnant to each other, and each cannot be a part of the Constitution at the same time.

The Legislature was fully cognizant of the provision of Sec. 1, Art. XVII—and of the decision of this court in the Advisory Opinion to the Governor, *supra*, when it

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submitted to the vote of the people as a part of the amendment to the Constitution, a condition rescuing it from the provisions of Art. XVII.

The decision of this court in the Correlis case, *supra*, that was concurred in by all the Justices, seems to me conclusive on this question.

“By the terms of this amendment it was to go into effect on the first day of January, A. D. 1919. This of itself rescued the amendment from the provision of Article XVII, by which amendment to the Constitution become effective upon receiving the approving majority of the votes of the electors at the election. Criminal Costs Amendment, Advisory Opinion to the Governor, 15 Fla. 735; see also, Basnett v. City of Jacksonville, 19 Fla. 664. In those cases the amendments did not fix a day subsequent to the adoption for the amendment to take effect. 12 C. J. 721; Reade v. City of Durham, *supra*; Am. & Eng. Ency. Law (2nd ed.) 910.

Article XIX of the State Constitution providing for local option sales of intoxicating liquors remained in force until January 1, 1919, when it was superseded by the amendment to Article XIX forbidding the manufacture, sale, barter or exchange of alcoholic or intoxicating liquors and beverages in this State.”

ON REHEARING.

WHITFIELD, J.—The points enumerated in the petition for rehearing were not overlooked by the court.

Even if Chapter 7736, Acts of 1918, is “supplementary to Chapter 7288 of the Laws of Florida of 1917,” as stated in the petition for rehearing, but not in the act itself,

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the validity of Chapter 7736 is not thereby affected. Chapter 7288 expressly provides that, "This act shall become operative upon the adoption by the electors of the proposed amendment to Article XIX." If Chapter 7288 be invalid, that does not render Chapter 7736 invalid. Chapter 7733 by its terms took effect while Original Article XIX was in force. Its supposed invalidity does not affect the validity of Chapter 7736.

Chapter 7736 could not have been "passed to overcome the decision of the Supreme Court in the Francis case." (76 Fla. 304, 79 South. Rep. 753), as asserted in the petition for rehearing, since Original Article XIX to which the decisions in the Francis case refers, had ceased to exist as organic law when Chapter 7736 *became operative as law*. The decision in the Francis case has reference to Chapter 7284, which purported to be effective as law *while Original Article XIX of the Constitution was in force*.

The fact that Chapter 7736 contains a provision that "The intention is hereby expressed that this Act shall be construed as supplementary to the Act approved April 24th, 1917 (Chapter 7283), and so much of said Act as is not clearly inconsistent with the provisions of this Act shall remain in full force and effect throughout the State when this Act goes into effect," does not affect the validity of Chapter 7736 in the particulars involved in this case. Section 22, Chapter 7736, expressly provides "That, if for any reason, any section or provision of this Act shall be adjudged unconstitutional, or otherwise inoperative, such fact shall not be held to affect any other section or provision in this Act contained, but the same shall remain in full force and effect as if the section or provision adjudged unconstitutional or inoperative had not orig-

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inally been incorporated in this Act." "The Act approved April 24, 1917," is Chapter 7283, not Chapter 7284, that was involved in the decision in the Francis case.

In *Fine v. Moran*, 74 Fla. 417, 77 South. Rep. 533, it was held that statutory regulations of the *sale of non-intoxicating beverages* in dry counties did not violate Original Article XIX of the State Constitution, since such regulations were within the police power of the State and tended to enforce prohibitions of the sale of intoxicating liquors in dry counties.

In *Ex Parte Francis*, 76 Fla. 304, 79 South. Rep. 753, it was held that statutory regulations of the *possession and transportation of intoxicating* liquors violated Original Article XIX, because the inherent police power of the State to regulate the possession and transportation of intoxicating liquors in dry counties, was by implication restrained by Original Article XIX, under which *the sale* of intoxicating liquors was prohibited by local option elections.

In *Correlis v. State*, 78 Fla. 44, 82 South. Rep. 601, it was held that Amended Article XIX of the State Constitution took effect and became operative on January 1, 1919, and on that date entirely superseded original Article XIX. Amended Article XIX was only potentially efficacious between the date of its adoption at the general election in November, 1918, and the date on which the amended article became effective, January 1, 1919.

In *Morasso v. Van Pelt*, 77 Fla. 432, 81 South. Rep. 529, it was held that Chapter 7736, Laws of Florida, the statute here involved, regulating the transportation and possession of intoxicating liquors in the State, did not violate amended Article XIX of the State Constitution

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which forbids the manufacture, sale, barter or exchange of intoxicating liquors in this State.

In this case it was held that Chapter 7736, Laws of Florida enacted in December, 1918, to take effect January 1, 1919, did not violate original Article XIX, nor any other provision of the Constitution, since it did not become effective or operative as law until original Article XIX had ceased to be a part of the Constitution.

The prosecution in this case is for a violation of Chapter 7736, Laws of Florida, committed before the Federal Prohibition Amendment, Art. 18, became effective on January 16, 1920, and this proceeding is not affected by the Federal amendment or the statutory enactments of Congress thereunder.

Original Article XIX was a limitation upon the power of the legislature only in making effective any other method for determining whether *the sale* of intoxicating liquors *should be prohibited*, except the method provided in the Article, *viz.* local option elections.

In giving direct authority severally to the counties of the State to have local option prohibition of the sale of intoxicating liquors, original Article XIX did not otherwise limit the police power of the legislature. The rule *expressio unius est exclusio alterius* might be applied to limit the power of the legislature where the particular terms of an organic provision *specifically regulating legislative action as to the sale or gift of intoxicating liquors*, show an intent to thereby exclude legislative power to regulate the *mere possession* of intoxicating liquors, matters not mentioned in the organic provisions, as was held in *State v. Gilman*, 33 West Va. 146, 10 S. E. Rep. 283; *Holley v. State*, 14 Tex. App. 505; Common-

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wealth v. Campbell, 133 Ky. 50, 117 S. W. Rep. 383. But the rule of *expressio unius est exclusio alterius* can have no application to limit the powers of the legislature where express particular authority is conferred *directly* by the constitution itself, not upon the legislature, but *upon the counties* respectively, to prohibit the sale of liquors. This is necessarily so when the organic provision by its own force (and not *through legislative action* as in Texas, Kentucky and other States) *directly* confers a particular power *upon the counties* and expressly requires the legislature to enact laws to enforce the power conferred on the counties by the constitution itself. Even if the express organic command to enact laws to enforce the specific power conferred by the Constitution itself directly on the counties, is superfluous, upon the theory that such power and duty inheres in the legislature, certainly the express command does not impair the legislative authority in the premises, and the express command clearly shows an intent not to take from the legislature any power that is not expressly conferred upon the counties. Therefore in conferring *directly upon the counties* severally authority by local option elections to prohibit the *sale* of intoxicating liquors, original Article XIX did not limit or impair the inherent and commanded power and duty of the legislature to enact laws to enforce county local option prohibition of the sale of intoxicating liquors; and such laws may include statutory regulations of the transportation and possession of intoxicating liquors where the sale of such liquors is *unlawful*, since it is obvious and not denied that regulations of the possession and transportation of intoxicating liquors tend to prevent unlawful sales of such liquors and to enforce prohibition of sales pursuant to the Constitution, and there is nothing

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in the Constitution that expressly or impliedly forbids the enactment of such regulations by the legislature.

In *State v. Gilman*, 33 W. Va. 146, 10 S. E. Rep. 283, the organic provision that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this State," was treated as a *grant of power* to the legislature and not a limitation upon the general law-making power of the legislature, in the holding that such provision forbade a statutory regulation of the possession of spirituous liquors by one person for another by requiring a license therefor to be obtained. The rule *expressio unius est exclusio alterius* was applied apparently upon the theory that the legislature had no power to regulate the *possession* of intoxicating liquors as a means of preventing unlawful sales of such liquors. This assumption was doubtless predicated upon the organic right to possess property, without considering the principle that the possession of property that is harmful in its use may be regulated under the police power without violating organic property rights. Property rights that are subject to government regulation are not protected from such regulation by the organic right to acquire, possess and protect property.

In *State v. Sixo*, 77 W. Va. 243, 87 S. E. Rep. 267, it was held that the amended constitutional provision forbidding "the manufacture, sale and keeping for sale" of intoxicating liquors, etc., did not render invalid a statute regulating the possession of intoxicating liquors by requiring the containers of such liquors in excess of prescribed quantities to be marked or labeled in a stated manner. The rule *expressio unius est exclusio alterius* was applied in the *Gilman* case, but not in the *Sixo* case. The original organic provision apparently was no more a

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grant of power to the legislature than is the amended provision of the West Virginia Constitution.

The real holding in the Gilman case is that the particular regulation exceeded the police power of the State as interpreted *by the court at that time*. The same may be said of the case of State v. Williams, 146 N. C. 618, 61 S. E. Rep. 61, 17 L. R. A. (N. S.) 299, referred to in Glenn v. Southern Express Co., 170 N. C. 286, 87 S. E. Rep. 136, L. R. A. 1918-B 438; State v. Carpenter, 173 N. C. 767, 92 S. E. Rep. 373. The prevailing views are expressed in Crane v. Campbell, 245 U. S. 304, 38 Sup. Ct. Rep. 98; Barbour v. State, 249 U. S. 454, 39 Sup. Ct. Rep. 316; DeLaney v. Plunkett, — Ga. —, 91 S. E. Rep. 561, L. R. A. 1917-D 926; notes in 2 A. L. R. 1085; Schmitt v. W. Cook Brewing Co., — Ind. —, 120 N. E. Rep. 19; State v. Ross, — N. D. —, 170 N. W. Rep. 121; Commonwealth v. Intoxicating Liquors, 172 Mass. 311, 52 N. E. Rep. 389, and other like cases.

The Texas Constitution, Section 20, Article XVI, provided that “the legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice’s precinct, town or city, by a majority vote, from time to time may determine whether *the sale* of intoxicating liquors shall be prohibited within the prescribed limits.”

Under this organic provision it was in Holley v. State, 14 Tex. App. 505, properly held that the legislature could not authorize the counties, etc., of the State by local option election to prohibit the “gift” of intoxicating liquors. See Stalworth v. State, 16 Tex. App. 345; Steele v. State 19 Tex. App. 425; Nineger v. State, 25 Tex. App. 449, 8 S. W. Rep. 480.

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In *Ex Parte Brown*, 38 Tex. Crim. Rep. 295, 42 S. W. Rep. 554, 70 Am. St. Rep. 743, it was held that "the purpose and effect of the" above quoted provision of the Texas Constitution "was, and is, to restrict and limit the legislative authority to the powers *expressly granted therein*," and that a statute regulating the cold storage of intoxicating liquors in local option territory was "not within the legitimate scope of this express grant," and not "a fair and reasonable exercise of the police power." See *contra* *State v. Phillips*, 109 Miss. 22, 67 South. Rep. 651, L. R. A. 1915-D 530.

In the much later case of *Longmire v. State*, 75 Tex. Crim. 616, 171 S. W. Rep. 1165, Ann. Cas. 1917-A 726, text 729, it is said: "Instead of Section 20 of Article 16 being an implied limitation on the power of the legislature to pass all necessary laws to render effective the prohibition law wherever adopted, we think if the legislature had not already possessed the authority by virtue of being the representative of sovereignty, the authority to pass all necessary laws to render effective the prohibition law wherever adopted would be necessarily implied by virtue of Section 20 of Article 16." See *Ex parte Davis*, — Tex. Cr. App. —, 215 S. W. Rep. 341; *Ex parte Fulton*, 215 S. W. Rep. 331.

The Kentucky Constitution, by Section 61, provided that the general assembly shall "by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquor shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or repeal any law in force relating to the sale or gift of such liquors." In *Commonwealth v. Campbell*,

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133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Ann. Cas. 159, it was held that a *city ordinance* forbidding a person to transport into the city exceeding one quart of intoxicating liquor was invalid under the above quoted and other provisions of the Constitution that are stated in the opinion in that case. This *decision* related to the powers of the city under the particular statutes and organic provisions. In *Town of Cortland v. Larson*, 273, Ill. 602, 113 N. E. Rep. 51, L. R. A. 1917A 314, Ann Cas. 1916E 775, the *powers of a municipality* were determined. See *City of Delta v. Charlesworth*, — Colo. —, 170 Pac. Rep. 965. See also *Eidge v. City of Bessemer*, 164 Ala. 599, 51 South. Rep. 246, 26 L. R. A. (N.S.) 394, referred to in *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 South. Rep. 652, L. R. A. 1916C 278, where later conceptions of implied limitations upon a legislative exercise of the State's police power are expressed. See *Crane v. Campbell*, *supra*; *Barbour v. State*, *supra*; *State v. Hosmer*, — Minn. —, 175 N. W. Rep. 683; *People v. Willi*, 179 N. W. Suppl. 542, 109 Misc. Rep. 79; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. Rep. 44; *Fine v. Moran*, 74 Fla. 417, 77 South. Rep. 533; *Marasso v. Van Pelt*, 77 Fla. 432, 81 South. Rep. 529; *State v. Macek*, — Kan. —, 180 Pac. Rep.; re *Crañe*, 27 Idaho 671, 151 Pac. Rep. 1006, L. R. A. 1918A 942; *State v. Giaudrone*, — Wash. —, 186 Pac. Rep. 870.

In *Barber v. Commonwealth*, 182 Ky. 200, 206 S. W. Rep. 290, a statute forbidding the transportation of intoxicating liquor into local option territory where its sale was unlawful, was held to be invalid, the court referring to contrary decisions in other States, observed on page 206 that "it does not appear that their police power is limited by constitutional provisions similar to

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ours." This explains the reason for the decisions in Kentucky.

It is conceded that in this State the Legislature could have prohibited the sale of intoxicating liquor and could have reasonably regulated its possession and transportation as a means of preventing unlawful sales of such liquors, if the Constitution had not contained original Article XIX. That Article directly conferred upon the counties severally authority to prohibit *the sale* of intoxicating liquors by local option elections. To the authority conferred upon the counties the rule *expressio unius est exclusio alterius* was applicable and the Legislature could not have authorized *the counties* to prohibit or to regulate the possession or the transportation of intoxicating liquors by local option elections. But original Article XIX did not *grant* any power to the Legislature. By conferring the stated authority directly upon the counties, the general lawmaking power of the Legislature was thereby *limited by implication*, but only as to prohibitions of *the sale* of intoxicating liquors, which authority was given by the Constitution directly to the several counties. The Article contained a command that "the Legislature shall provide necessary laws to carry out and enforce the provisions of Section One of this Article." This is the only reference in the Article to the Legislature or to its lawmaking power. Original Article XIX merely limited the general lawmaking power of the Legislature as to *prohibitions of the sale* of intoxicating liquors. It makes it the duty of the Legislature to provide necessary laws to carry out and enforce *prohibitions of the sale* of intoxicating liquors pursuant to local option elections. The inherent power of the Legislature to make lawful prohibitions of sales *effective*, includes of necessity the power to prescribe all

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regulations expedient to that end, which reasonably and properly include regulations of the possession and transportation of intoxicating liquors where the sale of such liquors is made *unlawful* pursuant to the Constitution. See 245 U. S. 304; 226 U. S. 192.

Did Original Article XIX forbid the passage of Chapter 7736 to take effect January 1st, 1919?

Chapter 7736 did not become operative or effective until Original Article XIX ceased to be organic law; and neither Original Article XIX nor any other provision of the Constitution forbade the passage of Chapter 7736 while Original Article XIX was in force, the statute by its terms being made to take effect when its validity was secure under amended Article XIX.

In deciding in the Francis case that Chapter 7284 conflicted with Original Article XIX in so far as the statute purported *at that time* to regulate the possession and transportation of intoxicating liquors, the court did not hold that anticipatory statutes could not be enacted that would, under an amendment to the Constitution, be valid *when they became effective as laws* by the terms of their enactment. Amended Article XIX and Chapter 7736 are prospective in their operation. A statute is effective as law only when it becomes operative. *Sammis v. Bennett*, 32 Fla. 458, text 460, 14 South. Rep. 90; *Thompson v. State*, 56 Fla. 107, 47 South. Rep. 816; *Thorp v. Smith*, 64 Fla. 154, 59 South. Rep. 193; in re *Alexander*, 53 Fla. 647, 44 South. Rep. 175; *State v. Bentley*, 80 Kan. 227, 101 Pac. Rep. 1073; *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. Rep. 753, 45 L. R. A. 118.

As neither amended Article XIX nor Chapter 7736 was in force until after Original Article XIX had ceased to

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be a part of the Constitution, there was no conflict between Original Article XIX and amended Article XIX, or between Original Article XIX and Chapter 7736. Chapter 7736 did not purport to regulate the possession and transportation of intoxicating liquors while Original Article XIX was a part of the Constitution. The fact that Chapter 7288 was enacted in 1917 "to make effective Article XIX of the Constitution of the State of Florida as amended," such act to take effect upon the adoption of the proposed amendment to Article XIX, can have no bearing on the validity of Chapter 7736.

Whether amended Article XIX, in so far as it forbids the manufacture, sale, barter or exchange of intoxicating liquors, is self-executing or not, the validity of Chapter 7736 is not thereby affected. Amended Article XIX does not provide penalties for its violation, nor does it provide regulations suitable to its effective enforcement.

The provisions of amended Article XIX that "The Legislature shall enact suitable laws for the enforcement of the provisions of this Article" does not "have the effect of postponing the effectiveness of the amendment as a part of the Constitution of the State until there should be legislative regulation under the new Article after it becomes effective." There was and is nothing in the Constitution or Original Article XIX forbidding the passage of Chapter 7736 in December, 1918, to take effect January 1, 1919 concurrently with amended Article XIX that had already been adopted at the polls to take effect at the stated time. As Chapter 7736 was not effective as law until after Original Article XIX had ceased to be organic law, it could not have conflicted with such Article.

In substance the holding is that neither Original Article XIX nor any other provision of the Constitution

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forbade the passage and approval of Chapter 7736 in December, 1918, to take effect January 1, 1919, when amended Article XIX became effective as a part of the Constitution; and the Legislature may enact any law not forbidden by the Constitution. It is not contended that the provisions of Chapter 7736 involved in this case are invalid under amended Article XIX. The contention is that such provisions *could not lawfully be enacted* before amended Article XIX took effect.

The petition for rehearing states that "the plaintiff in error concedes that had he violated the law against the *manufacture or sale* of intoxicating liuqor he could have been punished under the provisions of Chapter 7288 of the Laws of Florida, 1917." Chapter 7288 was in 1917 enacted "to make effective Article XIX of the Constitution of the State of Florida as amended" and to "become effective upon the adoption by the electors of the proposed amendment to Article XIX." If Chapter 7288 was effective in 1919, for any purpose, no reason appears why Chapter 7736 was not also effective in 1919. After the enactment of Chapter 7288 and before the passage of Chapter 7736, the proposed amendment to Article XIX was adopted at the polls, and would inevitably take effect at the time stated therein.

The decision in *Ex Parte Francis*, 76 Fla. 303, 79 South. Rep. 753, was that certain provisions of Chapter 7284 *then sought to be enforced* were in conflict with Original Article XIX; but it was not decided that the Legislature could not enact a law to take effect in the future when it would be valid by virtue of an amendment to Article XIX that had been adopted at the polls to become effective concurrently with the statute.

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The suggestion that a statute enacted prior to January 1st, 1919, might provide penalties for the *manufacture* or *sale* of intoxicating liquors on and after January 1st, 1919, but that a statute could not be enacted *prior* to January 1st, 1919, to take effect January 1st, 1919, forbidding the *possession* or *transportation of* intoxicating liquors on and after January 1st, 1919, appears to be without support.

If Original Article XIX can be held to forbid the enactment prior to January 1st, 1919, of a law to take effect January 1st, 1919, to penalize the possession or transportation of intoxicating liquors after January 1st, 1919, then Original Article XIX, likewise forbade the enactment prior to January 1st, 1919, of statutes penalizing the manufacture or sale of intoxicating liquors, since Original Article XIX related to *local option sales* of intoxicating liquors and not to the possession or transportation of such liquors. There is nothing in Original Article XIX *forbidding the enactment* of a statute regulating the transportation and possession of intoxicating liquors, the statute not to take effect until a stated time in the future when an amendment to Article XIX would be in force under which amendment the statute would validly be operative. See *Pratt v. Allen*, 13 Conn. 119; *Galveston, B. & C. N.-G. Ry. Co. v. Gross*, 47 Texas 428. 12 C. J. 742.

The enactment of Chapter 7736 in December, 1918, was not by virtue of power conferred by amended Article XIX, for amended Article XIX was not in force until January 1st, 1919. Chapter 7736 was enacted pursuant to the general lawmaking power of the Legislature; and *the enactment* of Chapter 7736 in December, 1918, to take effect January 1st, 1919, was not forbidden by Original

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Article XIX, nor by any other provision of the Constitution. When Chapter 7736 became *effective and operative as law*, Original Article XIX had ceased to be a part of the organic law of the State.

There was no session of the Legislature after the Constitution of 1885, including Article XIX, was promulgated, until April, 1887, after the Constitution and Article XIX became effective as organic law January 1st, 1887. Nor was there a session of the Legislature after the adoption of the amendment to Section 9 of Article XVI in 1894, until the regular session of 1895. The same may be said of other amendments.

In *Sammis v. Bennett*, 32 Fla. 458, 14 South. Rep. 90, and *Thompson v. State*, 56 Fla. 107, 47 South. Rep. 816, it was held the statutes did not have the force of law till they "became operative" on dates subsequent to their enactment.

In *Mayor, etc., v. Blackburn*, 27 La. Ann. 544, the statute was passed after the new Constitution had been adopted; and an attempt was made to operate under it while the constitutional provisions with which it conflicted were in force. This is like the ordinary case of unconstitutional statutes.

As the enactment in December, 1918, of Chapter 7736 to take effect January 1st, 1919, was not forbidden by Original Article XIX, the statute was not "void from the beginning," and its effectiveness on January 1st, 1919, was valid under amended Article XIX, which became operative that day.

"A statute has not *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect." *Gilbert v. Ackerman*, 159 N. Y.

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118, 53 N. E. Rep. 753, 45 L. R. A. 118, 120; In re. Howe, 112 N. Y. 100, 19 N. E. Rep. 513, 2 L. R. A. 825; 36 Cyc. 1192 Notes 6, 7; City of Davenport v. D. & St. P. R. Co., 37 Iowa 624; Jackman v. Garland, 64 Me. 133.

“A statute passed to take effect at a future day is to be understood as speaking from the time it goes into operation, and not from the time of its passage.” Price v. Hopkin, 13 Mich. 318; Rice v. Ruddiman, 10 Mich. 125; 26 Am. & Eng. Ency. Law (2nd ed.) 563 notes 1 and 2.

“No statute has *ex proprio vigore*, any force until it becomes the law of the land.” Cargill v. Power, 1 Mich. 369, 370. See also Blow v. Lamberon, 1 Iowa 435, text 443; State v. Bentley, 80 Kan. 227, 101 Pac. Rep. 1073; Shook v. Laufer, (Tex. Civ. App.), 100 S. W. Rep. 1042; State v. Williams, 173 Ind. 414, 90 N. E. Rep. 754, 21 Ann. Cas. 986; Mills v. State Board of Osteopathic Registration & Examination, 135 Mich. 525, 98 N. W. Rep. 19, 3 Ann. Cas. 735 and notes.

“Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose.” 36 Cyc. 1192, notes 6 and 7; State v. Northern Pac. R. Co., 36 Mont. 582, 93 Pac. Rep. 945, 15 L. R. A. (N. S.) 134, text 138.

The Constitution expressly provides for the enactment of laws to take effect at a subsequent date; and in the light of reason and of the above authorities the constitutional validity of a statute should be determined as of the time when the statute becomes operative, not when it was enacted, unless the Constitution *forbids the passage* of the law at any time. The validity of a statute cannot be tested till it becomes effective or operative. Original

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Article XIX did not forbid the passage of Chapter 7736 to take effect when the Article ceased to be organic law. The legislature may enact any law not forbidden by the Constitution. 12 C. J. 746.

To hold that Chapter 7736 violates original Article XIX of the State Constitution, would be to give to the statute the force of law "during a period when the Constitution (in authorizing the law to state when it shall take effect) has declared it shall not take effect or be in force, and when the obvious design and intention was, that it should have no force or effect whatever." *Price v. Hopkin*, 13 Mich. 318, text 326-7; *Mills v. State Board of Osteopathic Registration & Examination*, *supra*. See also *in re. Alexander*, 53 Fla. 647, 44 South. Rep. 175; *Thompson v. State*, 56 Fla. 107, 47 South. Rep. 816.

In *McNeill v. Webeking*, 66 Fla. 407, 63 South. Rep. 728, it was said the courts consider only the power of the legislature to *enact* statutes alleged to be unconstitutional. In this case the holding is that neither the Constitution nor Original Article XIX when it was in force, forbade *the enactment* of Chapter 7736 in December, 1918, to take effect after Original Article XIX has ceased to be a part of the organic law.

In 12 C. J. 727, it is said: "An Act of the legislature not authorized by the Constitution at the time of its passage is absolutely void, and is not validated by a subsequent adoption of an amendment to the Constitution authorizing the passage of such an Act." Citing cases. These cases are as follows:

In *Seneca Min. Co. v. Osmun*, 82 Mich. 573, 47 S. W. Rep. 25, the statute was enacted after the amendment to the Constitution became effective as organic law.

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In State *ex rel.* Stevenson v. Tufly, 20 Nev. 427, 22 Pac. Rep. 1054, the statute was enacted under an amendment to the Constitution, which amendment was declared to be "not constitutionally adopted."

In Dewar v. People, 40 Mich. 401, and Mt. Pleasant v. Vanice, 43 Mich. 361, 5 N. W. Rep. 378, void ordinances were not validated by a subsequent amendment of organic law.

In State v. Ellis, 22 Wash. 129, 60 Pac. Rep. 136, a void act was not validated by a subsequent constitutional amendment that did not include the void act in its provisions.

In Banz v. Smith, 133 Cal. 102, 65 Pac. Rep. 309, and Fleming v. Hence, 153 Cal. 162, 94 Pac. Rep. 620, a void provision of a city charter was not validated by the subsequent adoption of an amendment to the Constitution.

In all these cases the statutes *purported to be effective* as laws, not merely enactments to take effect at a future date. The word "passage" as used in 12 C. J. 727, has reference to the taking effect of statutes as operative laws. See Schneider v. Hussey, 2 Hasbrouck's (Idaho) 8, 1 Pac. Rep. 343; Harding v. People, 10 Colo. 387, 15 Pac. Rep. 727; Churchill v. Bemis, 45 Neb. 724, 64 N. W. Rep. 348; Rogers v. Vass, 6 Iowa 405; Mills v. State Board of Osteopathic Registration & Examination, *supra*; Shook v. Laufer, *supra*; Scales v. Marshall, 96 Tex. 140, 70 S. W. Rep. 945; State v. Bentley, 80 Kan. 227, 101 Pac. Rep. 1073; 25 R. C. L. 796, Sec. 44; State v. Williams, 173 Ind. 414, 90 N. E. Rep. 754, 21 Ann. Cas. 986; In re Estate of Howe, 112 N. Y. 100, 19 N. E. Rep. 513, 2 L. R. A. 825; State v. Mounts, 36 W. Va. 179, 14 S. E. Rep. 407, 15 L. R. A. 243; Mills v. State Board of

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Osteopathic Registration & Examination, *supra*; State v. Williams, *supra*; Evansville & Crawfordville R. Co. v. Barbee, 74 Ind. 169.

In Etchison Drilling Co. v. Flourney, 131 La. 442, 59 South Rep. 867, it was held "that the Legislature was prohibited by the Constitution * * * from passing the Act" and "that the Act was unconstitutional at the time of its adoption or attempted adoption, and that it has not been validated by the subsequent adoption of the amendment to the Constitution," which amendment *was adopted after* the statute was enacted.

In none of the above cases was the question decided that is presented here.

A statute valid when enacted and made effective is not invalidated by a subsequent amendment to the Constitution, unless the amendment is designed to have that effect. See Cutting v. Taylor, 3 S. Dak. 11, 51 N. W. Rep. 949, 15 L. R. A. 691; Reade v. City of Durham, 173 N. C. 668, 92 S. E. Rep. 712.

Under the express provision of Section 18 of Article III of the Constitution that "no law shall take effect until sixty days from the final adjournment of the session of the Legislature at which it may have been enacted, unless otherwise specially provided in such law," Chapter 7736, "specially provided in such law," that "this Act shall go into effect on the first day of January, A. D. 1919." This specific designation of the future day when the Act "shall go into effect" is equivalent to a constitutional and legislative declaration that the statute shall have no effect until the designated day. 2 Am. & Eng. Ency. Law (2nd ed.) 565; Note 2; Larrabee v. Talbot, 5 Gill (Md.) 426, 46 Am. Dec. 637.

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Thus by virtue of the organic law and the express terms of the Act, the operation, force and effect of Chapter 7736 as law was suspended and the statute was rendered innocuous and without efficacy or potency as law from the moment of its enactment to January 1, 1919, when Amended Article XIX of the Constitution became effective and made the operation of the law valid when it took effect as "specially provided in such law," pursuant to the authority of the Constitution. See in re Hahrer, 140 U. S. 545, text 565, 11 Sup. Ct. Rep. 865; Tinker v. State, 90 Ala. 638, 8 South. Rep. 814; In re Stickler, 43 Fed. Rep. 653, 10 L. R. A. 446; in re Van Vliet 43 Fed. Rep. 761, 10 L. R. A. 451; Starace v. Rossi, 69 Vt. 303, 37 Atl. Rep. 1109; State v. Lord, 66 N. H. 479, 29 Atl. Rep. 556; Commonwealth v. Calhane, 154 Mass. 115, 27 N. E. Rep. 881; State *ex rel.* Bartlett v. Fraser, 1 N. Dak. 425, 48 N. W. Rep. 343; Blair v. Ostrander, 109 Iowa, 80 N. W. Rep. 330, 47 L. R. A. 469.

While Chapter 7736 was suspended and before it became operative as law it could not conflict with original Article XIX or with any other provision of the Constitution, the mere enactment of the statute to take effect at a future day when its operation would be valid not being expressly or impliedly forbidden by any provision of organic law. The enactment of statutes to take effect and become operative in the future being expressly provided for by the Constitution, a large part of the statute laws of the State whose validity is not questioned was enacted to take effect and become operative at dates subsequent to their enactment.

To make Chapter 7736 effective prior to January 1, 1919, so as to conflict with Original Article XIX, would violate the express provisions of Section 8 of Article III

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of the State Constitution, making a statute effective as "specially provided in such law."

In order to conflict with Original Article XIX of the Constitution while that Article was in force as organic law, Chapter 7736 must be construed to have been effective as law prior to January 1, 1919, in violation of Section 8 of Article III of the Constitution and in opposition to the express terms of the statute. 26 Am. & Eng. Ency. Law (2nd ed.) 565, Note 2.

The Supreme Court of the United States has held the Act of Congress of October 8th, 1919, known as the Volstead Prohibition Enforcement Act, to be a valid law, although it was passed by Congress before the Eighteenth Amendment to the Federal Constitution *became effective* on January 16th, 1920, and although Congress has no legislative power except such as is granted to or conferred upon it by the Constitution of the United States. *Rhode Island v. Palmer*, U. S. Sup. Ct. June 7/20.

If the Volstead Federal Enforcement statute enacted October 28th, 1919, after the Eighteenth Amendment to the Federal Constitution had been adopted by the Legislatures of three-fourths of the States of the Union, but before the amendment became effective January 16th, 1920, is a valid law, when the Congress has no power to enact laws except as that power is granted by the Federal Constitution, then Chapter 7736, Laws of Florida, is a valid law for the reason that the Legislature may enact any statute that is not forbidden by the State or Federal Constitution, and there is nothing in Original Article XIX, or in any other provision of the State Constitution or in the Federal Constitution forbidding the Legislature to enact Chapter 7736, in December, 1918, to take effect

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only after original Article XIX had ceased to be a part of the organic law of the State.

In Section 1, Article III of the State Constitution, "the legislative authority of the State is vested in the Legislature." Other provisions of the Constitution relate to specific legislative powers or limitations. As the general lawmaking power of the State is vested in the Legislature, and as no provision of the Constitution forbade the enactment of Chapter 7736, it seems inevitable that its enactment to become effective concurrently with amended Article XIX was within the lawmaking power of the State Legislature.

Even though portions of Chapter 7736 may be invalid, should they be found to be in conflict with organic property rights, the provision of the statute under which the petitioners are held does not violate any organic rights, and being severable and enforceable without reference to portions of the statute that may be invalid, is not affected thereby; and the enactment of Chapter 7736 after the adoption at the polls of amended Article XIX, but before it became operative, the statute to take effect concurrently with the amended Article of the Constitution, does not appear to be violative of any provision or principle of organic law.

Certainly it cannot be said that beyond all reasonable doubt the Legislature had no power to enact Chapter 7736 in December, 1918, to take effect January 1, 1919, concurrently with the then adopted amended Article XIX of the State Constitution; and all the authorities hold that if there is a reasonable doubt as to the constitutionality of a statute, it is the duty of the courts to give effect to the enactment, since a statute is the law of

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the land unless it is in undoubted conflict with some identified provision of the State or Federal Constitution.

Affirmed.

ELLIS AND WEST, J. J., concur.

BROWNE, C. J., AND TAYLOR, J., dissent.

B. L. STEEN, TAX PAYER RESIDING IN SPECIAL TAX SCHOOL DISTRICT No. 1, *Appellant*, v. BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, FLORIDA, AND SPECIAL TAX SCHOOL DISTRICT No. 1 OF SAID COUNTY, *Appellees*.

Opinion Filed June 30, 1920.

1. On an application for a bond issue under the provisions of Section 2, Chapter 6542, Acts of 1913, the County Board of Public Instruction has discretionary power to determine the amount of bonds required for the purposes set forth in the petition.
2. If no appeal is taken from a decree validating and confirming a school bond issue within twenty days from the rendition of the decree, such decree is forever conclusive of the validity of the bond.
3. An order of the Chancellor vacating a decree of confirmation and validation of a school bond issue, entered more than twenty days after the rendition of the validating decree, is void.

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An Appeal from the Circuit Court for Palm Beach County, E. B. Donnell, Judge.

Decree affirmed.

A. C. Adams, for Appellant;

Metcalf & Blackwell, for Appellees.

BROWNE, C. J.—This is an appeal from a decree validating a bond issue of Special Tax School District No. 1 of Palm Beach County.

The assignment of errors of the appellant, and cross assignment of appellees raise the questions, (1) of the power of the Circuit Judge on the application of a resident taxpayer and freeholder, to vacate and set aside a decree validating the bond issue after the lapse of more than twenty days from the entry of the decree validating the bond issue; and (2) the right of the Board of Public Instruction to call an election to vote on a bond issue of \$125,000 upon a petition duly signed and presented for a bond issue of one hundred thousand dollars.

(1) Upon the presentation of the petition, the Board of Public Instruction determined by resolution that \$125,000 of bonds was required for the purposes set forth in the petition.

Section 2, Chapter 6542, Acts of the Legislature 1913, provides in part: "The County Board of Public Instruction shall determine by resolution to be entered in its records what amount of bonds is required for the purposes set forth in said petition." It is contended by the appellants that the action of the Board in determining

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that \$125,000 was required for the purposes set forth in the petition, was null and void because the only authority of the Board in the matters was to issue the exact amount of bonds asked for. There is nothing in the statute to warrant that conclusion. The law imposes upon the Board of Public Instruction the duty to determine "what amount of bonds is required for the purposes set forth in said petition." If the Board were bound by the amount named in the petition there would be nothing for it to "determine," as that would have been determined by the petitioners, and there would be nothing left for the Board to do but to issue the call for such an amount. This would make the Board the mere recording clerk of the petitioners.

The provision of the law vesting in the Board of Public Instruction the power and authority to determine what amount of bonds would be required, is a very reasonable one. The residents of a Special School Tax District may petition the Board to issue bonds "for the purpose of acquiring, building, enlarging, furnishing or otherwise improving school buildings or school grounds, or for any other exclusive use of the public free school within any such special tax school district." Sec. 1, Chap. 6542, Acts 1913.

It is not likely that each signer of the petition would have the facilities for knowing, or would be competent to decide if he knew, just what amount of money would be necessary for any or all of these purposes, and the statute vests in the Board of Public Instruction the power to ascertain, and after ascertaining, to determine the amount of bonds required for the purposes set forth in the petition. We are quite satisfied that the Board had authority to submit to the qualified voters the ques-

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tion of whether \$125,000 of bonds should be issued or not.

(2) The decree validating the bonds was entered on the 15th day of January, A. D. 1920. On the 8th of March, 1920, a motion to vacate the decree of confirmation was filed by Bert A. Steen, a resident taxpayer and freeholder, upon the grounds that the decree was absolutely null and void because the Board determined that \$125,000 was necessary for the purposes set out in the petition. This motion was granted on the 8th day of March, and Steen then filed a demurrer to the petition, the grounds of which were that the petition showed on its face that the 25% of the duly qualified electors petitioned the Board of Public Instruction for a bond issue of \$100,000 and that the Board determined that \$125,000 would be adequate, and issued a call for an election to decide if that amount of bonds should be issued, and that this action by the Board rendered the entire proceedings null and void. The demurrer was overruled and the petitioner refusing to plead further, the court entered its decree on the 8th of March, 1920, again validating and confirming the bond issue.

Section 3, Chapter 6868, Acts of 1915, provides in part, that, "Any taxpayer or citizen may become a party to said proceedings; and any party thereto, whether complainant, defendant or intervenor, dissatisfied with the decree of the court, may appeal therefrom to the Supreme Court within twenty days." Section 4 of same chapter provides in part: "In the event no appeal is taken within the time prescribed herein, * * * the decree of the Circuit Court validating and confirming the issuance of the bonds or certificates shall be forever conclusive as to the validity of said bonds or certificates against the

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county, municipality, taxing district, or other political district or subdivision issuing them, and against all taxpayers and citizens thereof; and the validity of said bonds or certificates shall never be called in question in any court in this State."

The first decree of the Circuit Court validating the bonds was rendered on the 15th day of January, 1920. No appeal was taken from this decree, and twenty days thereafter such decree became "forever conclusive as to their validity."

The Board of Public Instruction having the right to determine that \$125,000 was needed for the purposes set out in the petition, and the Circuit Court having on January 15th, entered its decree validating the bonds, it was without authority to set aside its decree, and enter the decree of March 8, 1920. The order of the court setting aside and vacating the decree of January 15, 1920, and entering its decree of March 8, 1920, being without authority of law, that decree must be reversed.

It follows, therefore, that the decree entered January 15, 1920, validating and confirming the bond issue not having been appealed from within twenty days must be, and is hereby, reinstated and adjudged to be in full force and effect.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., Concur.

Riggins v. State of Florida—Opinion of Court.

MALLOBY RIGGINS, *Alias* MALLIE RIGGINS, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed June 30, 1920.

A Writ of Error to the Circuit Court for Duval County; George Couper Gibbs, Judge.

Ernest Dart, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *Worth W. Trammell*, Assistant, for the State.

WHITFIELD, J.—Upon an indictment for murder in the first degree by fatally shooting from a premeditated design to affect her death, the plaintiff in error was convicted of the murder of his wife as charged, and took writ of error, presenting as errors the insufficiency of the evidence to sustain the verdict, the rulings of the court on the admissibility of evidence adduced at the trial and the failure of the court to charge the jury upon the crime of murder in the third degree.

There was no request for a charge on murder in the third degree, and the evidence adduced did not require a charge upon that degree of murder.

The fatal shooting was admitted and was sought to be excused on the theory of accident, but the evidence did not require such a finding. Evidence admitted over objection could not under the admissions of the defendant have been harmful even if error, and there is ample basis for the finding of murder in the first degree.

Counsel for the plaintiff in error has forcefully presented the exceptions taken, but no material errors of pro-

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cedure appear, and the facts in evidence fully warrant the conviction.

Judgment affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

HENNING LAND IMPROVEMENT COMPANY, A CORPORATION,
Appellant, v. WESTERN AND FLORIDA LAND COMPANY, A
CORPORATION, *Appellee*.

Decision Filed June 30, 1920.

An Appeal from a Decree of the Circuit Court within
and for the County of Sumter; W. S. Bullock, Judge.

Hocker & Martin, for Appellant;

H. M. Hampton and *A. B. McMullen*, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises; and it appearing to the Court that the decree in the case of Western and Florida Land Company versus Henning Land Improvement Company was affirmed here at the last term; and that, as a consequence, the decree entered in this cause is erroneous; it is therefore, considered, ordered and ad-

Drew Lumber Co. v. Sizer—Opinion of Court.

judged by the Court that the said decree of the Circuit Court be, and the same is hereby, reversed.

All concur.

DREW LUMBER COMPANY *et al.*, *Appellants*, v. ROBERT R. SIZER, *Appellee*.

Opinion Filed June 30, 1920.

An Appeal from the Circuit Court for Columbia County; M. F. Horne, Judge.

John T. Crawford, for Appellants;

Kay, Adams & Ragland, for Appellee.

PER CURIAM.—A bill was filed by Sizer, a stockholder in the Drew Lumber Company, against the company and others, some of whom are alleged to have been stockholders and officers of the company, and others who are alleged to have had dealings with the company and its officers under such circumstances as violate the rights of complainant and entitle him to an accounting and to other appropriate relief involving large interests and rights in lands and other property.

Two separate demurrers to the bill of complaint were overruled, and from such orders an appeal was taken. On the allegations admitted by the demurrers the complainant would be entitled to relief if such allegations are not met and controverted by due course of procedure.

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At this stage of the cause a detailed discussion of the voluminous allegations and of the grounds of the demurrers addressed thereto will not be undertaken, since the admitted allegations and the prayers for relief will be a sufficient guide to the chancellor in applying appropriate legal principles unless further proceedings require the consideration of other matters that affect the equities, in which case discussions on this interlocutory appeal may be ultimately of little value in the final disposition of the cause.

Order affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

J. P. FELT, *Appellant*, v. CHARLES H. MORSE, *Appellee*.

Opinion Filed June 30, 1920.

Petition for Rehearing Denied July 31, 1920.

1. Although time may not be of the essence of the original contract to sell and convey land, it may subsequently be made so by express notice given by a party to the contract who is not in default to the other party who is in default, requiring the contract to be performed within a stated time, which must be a reasonable time according to the circumstances of the case.
2. Under a contract for the sale of land where no definite date has been agreed upon for the consummation of the contract, in order to constitute time of the essence of the transaction, the party to the contract entitled to insist upon perfor-

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mance should fix a definite date in the future for performance, of which the other party thereto is duly notified, which affords to such party reasonable time within which to comply.

3. Where rescission of a contract is not by mutual consent, a party thereto who is not himself in default and who elects to rescind must, in order to affect rescission, give notice to the opposite party of his intention to rescind with reasonable time thereafter within which to comply with the contract.
4. Where the record title of a vendor seeking specific performance of an agreement to sell and convey land is defective, the lapse may be supplied by parol proof of adverse possession under color of title for the statutory period sufficient to establish ownership, even though the contract calls for a perfect title, but not a perfect record title.
5. From the time the owner of land enters into a binding contract for its sale he holds the same in trust for the purchaser and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen and is entitled to any benefit which may accrue to such land in the interim between the agreement and the conveyance thereof to such vendee.

An Appeal from the Circuit Court for Seminole County,
James W. Perkins, Judge.

Decree reversed.

Cooper, Cooper & Osborne and Giles J. Patterson, for Appellant;

Massey & Warlow, for Appellee.

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WEST, J.—The controlling question in this case is whether, under the facts, the law will give to appellant the relief sought by him. It is so stated by counsel who bring the case here. There is little controversy as to the material facts.

The parties appellant and appellee, hereinafter referred to as vendor and purchaser respectively, entered into an agreement by which the vendor agreed to sell and the purchaser to buy certain described land in Seminole County upon which there was an orange grove, together with equipment, and subject to perfect title in the vendor. The contract was made, as appears from a telegram and letter in the record, on December 29 and 30 A. D. 1916. There was no formal written contract but the purchaser, at the vendor's request, deposited "in escrow" in a designated bank \$1,000 of the purchase money and on January 1, 1917, entered into possession of the property.

In the early part of January, 1917, an abstract of the title of the land was delivered to the purchaser and such abstract was thereupon placed in the hands of his attorneys for examination who, in the latter part of the month, reported that the abstract showed certain defects in the vendor's title.

On the 3d, 4th and 5th of February following a freeze occurred which damaged the orange grove badly and rendered the property less valuable.

The objections to the vendor's title which were pointed out by the purchaser's attorneys were defective acknowledgments of two deeds in the chain of title of the vendor, but counsel for the respective parties seem to have agreed that the defects would be corrected by properly acknowl-

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edged quit-claim deeds from the grantors in the defectively acknowledged deeds and that the vendor's title thereupon would become such as to meet the requirements of the contract.

When these objections were called to his attention the vendor proceeded to correct the defects. To do so he obtained during the month of February a quit-claim deed properly acknowledged from the grantor in one of the defective deeds and procured an affidavit showing his actual adverse possession of the property for the statutory period, his object being to show a valid title by adverse possession against the grantor in the other defectively acknowledged deed.

On February 28 an employee of the purchaser who was in possession of the property (who had prior to the contract been in the employ of the vendor) informed the representative of the vendor that the purchaser's agent, who had represented him in making the contract, had stated to him, the employee, that the purchaser intended to rescind the contract and go no further with the transaction. Thereupon, on March 1, 1917, the vendor tendered his deed for the property to the purchaser who declined to accept it. In declining to accept the deed the purchaser, or his representative, stated that he had on that day written a letter to the vendor, copy of which was then produced, in which he stated his reasons for such action. The reasons given were delay in removing the objections to the vendor's title to the property and the change in the condition of the property occasioned by the freeze.

The vendor, in the meantime having located the grantor in the other defectively acknowledged deed, secured from her a quit-claim deed for the property, properly acknowl-

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edged, recorded the same, and on March 5, by letter, so advised the representative of the purchaser, stated that he had fully complied with the contract and insisted that payment for the property be made by the purchaser in accordance with the terms of the contract.

The purchaser declined to go any further with the transaction, whereupon the vendor brought suit for specific performance of the contract.

The decree was for the defendant.

The original agreement between the parties fixed no time for the delivery of the deed and the payment of the purchase money. There was no later express agreement fixing such time. Time therefore was not of the essence of the contract unless it was specifically made so by the conduct of the parties. If at any time during the negotiations time became, because of an act of either of the parties, of the essence of the contract, the other party was entitled to a reasonable time after notice of such act within which to perform the contract. The rule in such cases is stated in *Asia v. Hiser*, Admr., 38 Fla. 71, 20 South. Rep. 796. The court said: "Although time may not be of the essence of the original contract, it may subsequently be made so by an express notice given by a party who is not in default to the other party who is in default, requiring the contract to be performed or rescinded within a stated time, which must be a reasonable time according to the circumstances of the case."

The case of *Forssell v. Carter*, 65 Fla. 512, 62 South. Rep. 926, involved the same principle. In that suit an assignee of a contract to purchase certain land brought suit to require performance of the contract by the owner of the land who was a party to the contract. The contract

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contained a provision that the time of payment should be an essential part of the contract. In considering the question of the right of the owner to declare a forfeiture of the purchaser's right to purchase the property under the contract upon his failure to make payment therefor upon the date fixed in the contract, the court said: "In such a case as this we believe the law to be that the vendor must give reasonable notice to the vendee that he will insist on payment as provided in the contract, and if he fails to do so before the date for payment he must fix a future time and give reasonable notice to the vendee in order that he may have an opportunity to comply. In this way alone can the vendor make time an essential part of the contract."

In the case under consideration the contention seems to be that although under the original agreement time was not of the essence of the contract, when the vendor on March 1, 1917, tendered his deed to the purchaser, before the objections of his counsel to the vendor's title had been fully met, and demanded payment of the consideration agreed to be paid for the property, that this act gave to the purchaser the right to then rescind the contract. This contention cannot be sustained. We have seen that the vendor had in a measure met the objections of the purchaser to his title. He had obtained a quit-claim deed properly acknowledged from the grantor in one of the defectively acknowledged deeds in his chain of title and had procured an affidavit showing his actual adverse possession of the property for the statutory period. This *prima facie* perfected his title. The contract did not call for a perfect record title. *Freedman et al. v. Oppenheim*, 187 N. Y. 101, 79 N. E. Rep. 841; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. Rep. 527; *Conley et ux v. Finn*, 171 Mass. 70, 50 N. E. Rep. 460. The parties presumably were act-

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ing in good faith. The defects pointed out by counsel in the vendor's record title were susceptible of correction. The vendor seemed to be of the impression that what he had done was sufficient to meet the objections to his title, and it would be a harsh rule that would under the circumstances here presented require a vendor to tender a deed to property contracted to be conveyed at the peril of giving to the purchaser the absolute right *eo instanti* to declare all rights of the vendor under the contract forfeited.

The true rule we think is clearly stated by the Supreme Court of Alabama in the case of *Elliott v. Howison*, 146 Ala. 568, 40 South. Rep. 1018. The court said: "Where rescission is not by mutual consent, and the opposite party has not repudiated the contract, to affect rescission, notice of the rescission must be brought home to the opposite party and reasonable time must be given him after the notice to comply."

If it should be conceded that the offer to deliver the deed by the vendor to the purchaser on March 1, 1917, gave to the purchaser the right to then rescind the contract, upon his election so to do it was incumbent upon him to so notify the vendor and allow him a reasonable time thereafter within which to comply with the contract, and it cannot be said that March 5 following the day upon which the vendor's title was placed in such condition of record as to meet every criticism of the purchaser's counsel, was an unreasonable time for complying with the contract.

We conclude, therefore, that there was no sufficient warrant for the purchaser's refusal to perform the contract because of the time consumed by the vendor, ap-

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proximately sixty days, in so perfecting his title to the property as to meet the objections raised thereto.

The other reason assigned by the purchaser for his refusal to perform the contract was the damage to the orange grove by the freeze and the consequent depreciation in value of the property. We have seen that possession of the property was taken by the purchaser on January 1, 1917, immediately after the contract was made, and that the freeze occurred on February 3, 4 and 5, while the purchaser was in possession of the property; that he undertook to rescind the contract on March 1 and declined to accept the deed tendered him on that day and again refused to make payment for the property a few days later, although advised at the time that his objections to the title had been satisfactorily met. It is not denied that the freeze had damaged the orange grove and that the property was worth less after the freeze than it was at the time the contract was made. The question then is upon whom must the loss fall. A consideration of the relation of the parties after the contract had been entered into will be helpful in determining this question.

In the case of Insurance Company of North America et al v. Erickson, 50 Fla. 419, 39 South. Rep. 495, this court passed upon the question of the legal effect of a contract similar to the one under consideration. The question there was whether one who had contracted to sell certain lots of land was the "unconditional and sole" owner of such lots within the meaning of that term as employed in a fire insurance policy written upon certain buildings upon the lots. That case differed from this in that there the vendor retained possession of the property contracted to be sold; here possession of the property

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contracted to be sold was delivered to the purchaser when the contract was made. The court said: "Upon the execution and delivery of the contract of sale set up in the defendant's plea the vendor Erickson became the holder of the legal title in trust for his vendee Burch as security for the deferred purchase price due from the latter to the former, and the vendee Burch held the purchase price as trustee for his vendor. 2 Story's Eq. Juris. (13th ed.), Sec. 789. We do not think that the retention of possession of the land by the vendor Erickson makes any material difference in his *status* as owner so as to affect the question under discussion. He had the right to stipulate, as he did do, for the retention of possession until the purchase money was paid, but this did not render the transaction any the less an unqualified sale of the property on his part and purchase thereof by his vendee. This contract of sale and purchase having been entered into prior to the issuance of the policies of insurance sued upon, and being in full force and effect at the time they were issued, rendered the said policies void according to their express terms, and they cannot be recovered upon."

That the contract under consideration was for a "perfect title" and defects in the record title were found do not forbid the application of this principle. The defects were not vital. The vendor was proceeding with reasonable dispatch, with the seeming acquiescence of the purchaser in a manner apparently satisfactory to him, and with reasonable assurance of success to correct such defects, and, as we have seen, did, within a reasonable time, so perfect his record title as to meet the objections of the purchaser.

In this situation we think the rule announced by the

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Supreme Court of Maryland in the case of *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, is applicable. After citing certain English cases in support of its holding, the court said: "From these and other authorities of equal weight, announcing the maxim that equity regards as done that which was agreed to be done, is deduced as the established doctrine in equity, that from the time the owner of an estate enters into a binding agreement for its sale he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase-money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the *interim* between the agreement and the conveyance."

In Pomeroy's *Specific Performance*, page 397, the rule is stated as follows: "The doctrine is fully supported by the American decisions, that the purchaser must sustain any loss happening to the subject-matter between the date of concluding the agreement and that of the conveyance; and, on the other hand, is entitled to any increase or gain which may arise during the same period. (1) Thus, where a manufactory had been sold at auction by order of the court, and between the sale and the confirmation thereof, the machinery and fixtures were carried off by trespassers, the purchaser was still compelled to specifically perform his agreement. (2) A rise in value of the subject-matter, between the contract and the carrying into effect, resulting from a change in circumstances or discoveries, and the like, enures to the benefit of the purchaser, and is no ground for the vendor's refusing to perform, it being understood, of course, that the agreement was fair in its inception, without any fraud, or any feature which equity calls mistake; (3) nor will a fall in the value, even though sudden and unforeseen, enable

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the vendee to resist a specific execution at the suit of the vendor."

There is nothing to suggest any element in this transaction that would vitiate the contract. Both parties, so far as the record discloses, were familiar with the property and acquainted with its value. It is a matter of common knowledge that the value of an orange grove in Seminole County may during the winter season be affected by cold. The purchaser is charged with knowledge of this fact. That the grove on the property purchased by him was so affected so soon after its purchase is a misfortune. It was not, however, the fault of the vendor. The purchaser was in possession. If the grove could have been protected it was his duty to protect it and its changed condition resulting from the freeze is no sufficient warrant for his repudiation of his contract to purchase.

From what we have said it follows that the decree must be reversed.

BROWNE, C. J. AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

LEONARD MATTAIR, BY J. B. MATTAIR, HIS NEXT FRIEND,
Plaintiff in Error, v. SEABOARD AIR LINE RAILWAY COM-
PANY, A CORPORATION, *Defendant in Error*.

Decision Filed June 30, 1920.

Petition for Rehearing Denied July 15, 1920.

Writ of Error to a judgment within and for the Coun-
ty of Duval; Daniel A. Simmons, Judge.

Wright et al. v. Wright et al.—Decision of Court.

George C. Bedell and *A. H. & Roswell King*, for Plaintiff in Error;

Fleming & Fleming, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby affirmed.

All concur.

JULIA M. WRIGHT, WIDOW, AND JESSIE E. WRIGHT, AND MARGARET WRIGHT, MINORS, BY SAID JULIA M. WRIGHT, AS THEIR NEXT FRIEND, *Appellants*, v. JESSE E. WRIGHT AND ALLINE L. WRIGHT, *Appellees*.

Decision Filed July 2, 1920.

An Appeal from a Decree of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

N. B. K. Pettingill and *Macfarlane & Macfarlane*, for Appellants;

Mabry & Carlton and *Wm. L. Pencke*, for Appellees.

Smith v. Powell et al.—Syllabus.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

A. L. SMITH, *Appellant*, v. H. F. POWELL AND J. T. MAPOLES, *Appellees*.

Opinion Filed July 2, 1920.

1. An injunction should not be granted when the remedy at law is adequate.
2. In cases where there is a plain and adequate remedy at law, a resort to a court of chancery is unnecessary and improper.
3. Where it appears from the allegations of a bill that there is an adequate remedy at law, there is no jurisdiction in a court of equity to hear and determine the matter in controversy.

An Appeal from the Circuit Court for Okaloosa County; D. J. Jones, Judge.

Orders affirmed.

W. J. Rice, for Appellant;

S. K. Gillis, for Appellees.

Smith v. Powell et al.—Opinion of Court.

WEST, J.—By his second amended bill in equity appellant, as complainant below, in substance alleged the making of a contract with appellee Powell on the 5th day of January, A. D. 1916, to purchase certain described land; appellant's entry into the possession of such land pursuant to the terms of the contract; the erection by him of a building thereon and the establishment of a business which he conducted in such building; his discovery thereafter that appellee did not own the land as represented at the time the contract was made and appellee's consequent inability to make a valid conveyance thereof to appellant; appellant's ability and willingness to perform the contract but failure to do so because of appellees' inability; the recovery by appellee of a verdict and judgment in a suit in ejectment against appellant for the possession of the property, and that such verdict and judgment were for various stated reasons void and unenforceable.

The prayer is for an injunction against the enforcement of the judgment and for specific performance of the contract.

The contract, which is made a part of the bill, contained a provision that appellant should remain in possession of the property during the time that he kept the terms of the contract; it provided for the payment of the consideration for said property in two equal installments, one payable thirty days after date and the other one year after date made the time of payment of the essence of the contract; and provided further that in default of the payment of either of the installments when due the right of the appellant to possession of the property or the improvements that he had placed thereon should terminate.

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The judgment in ejectment was recovered on the 5th day of January, A. D. 1918, and the original bill was filed on the 15th day of February, A. D. 1918.

There was a demurrer to the bill upon the ground, among others, that it contained no equity. Upon a hearing this demurrer was sustained. Demurrers were also sustained to the original and the first amended bill. The appeal is from the several orders sustaining demurrers to the several bills and from an order dissolving a temporary injunction which had been granted in said cause and dismissing the bill.

There was no error in any of the orders appealed from. It is apparent from the allegations of the bill that there was, at the time of the institution of the suit, an adequate remedy at law. This being true, there was no jurisdiction in a court of equity to hear and determine the cause. The court below therefore properly sustained the several demurrers to the several bills and properly dissolved the temporary restraining order and dismissed the bill for the same reason. *Barnett v. Hickson*, 52 Fla. 457, 41 South. Rep. 606; *Peacock et al. v. Feaster et al.*, 52 Fla. 565, 42 South. Rep. 889; *Metcalf Co. v. Martin*, 54 Fla. 531, 45 South. Rep. 463; *Simmons v. Williford*, 60 Fla. 359, 53 South. Rep. 452; *McCall v. Matheson*, 66 Fla. 157, 63 South. Rep. 701.

The orders appealed from are affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Fell v. Kilbee et al.—Decision of Court.

LEWIS E. SHIVER, *Plaintiff in Error*, v. TOSOHATCHEE
RANCH COMPANY, A CORPORATION, *Defendant in Error*.

Opinion Filed July 2, 1920.

A Writ of Error to the Circuit Court for Osceola
County; James W. Perkins, Judge.

Jones & Jones, for Plaintiff in Error;

Robinson & Beardall, for Defendant in Error.

PER CURIAM.—In an action on a promissory note pleas
setting up a novation of which the plaintiff had notice
and other defenses were overruled on demurrer and
judgment for the plaintiff rendered.

On writ of error it appears that a defense may be
proven under the pleas and that the judgment should be,
and is, reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND
WEST, J. J., concur.

MRS. H. M. FELL, *Appellant*, v. CECELIA KILBEE AND W.
H. KILBEE, HER HUSBAND, *Appellees*.

Decision Filed July 2, 1920.

An Appeal from a Decree of the Court of Record
within and for the County of Escambia; C. Moreno
Jones, Judge.

Bannerman v. Catts et al.—Syllabus.

John C. Avery and D. W. Berry, for Appellant;

Sullivan & Sullivan, for Appellees.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Court of Record be, and the same is hereby, affirmed.

All concur.

ROBERT L. BANNERMAN, *Appellant*, v. SIDNEY J. CATTS, AS
GOVERNOR, AND OTHERS, *Appellees*.

Opinion Filed July 3, 1920.

1. Chapter 6456 of the Acts of 1913, Laws of Florida, as amended by Section 1 of Chapter 7862 of the Acts of 1919, Laws of Florida, provides for the establishment of the "Everglades Drainage District," for the purpose of protecting the land embraced therein from the effects of water, for agricultural and sanitary purposes, for the public convenience and welfare, and the public utility and benefit. It is well settled that the drainage and reclamation of swamp and overflowed lands are a proper exercise of legislative authority.
2. The provisions of Chapter 6456, Acts of 1913, Laws of Florida, as amended by Chapter 7862, Acts of 1919, Laws of

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Florida, are not in conflict with Sections 20 and 21 of Article III of the Constitution of Florida. See also *Lainhart v. Catts*, 73 Fla. 735, 75 South. Rep. 47.

3. The provisions of Chapter 6456, Acts of 1913, Laws of Florida, as amended by Chapter 7862 of the Acts of 1919, Laws of Florida, are not in conflict with Sections 1, 2, 3 and 5 of Article IX of the Constitution. The assessment made under the Acts herein involved is a special assessment for local benefits, and does not come within the Sections 1, 2, 3 and 5 of Article IX of the Constitution. See also *Lainhart v. Catts*, *supra*.
4. It being within the legislative power to establish, directly, a drainage district for legitimate public purposes, (*Lainhart v. Catts*, *supra*), it is also within the power of the Legislature to determine the amount of the benefits to be derived, and the necessity and advisability of the local assessment, and when this is done, it is conclusive, and not subject to review by the courts, unless it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power; the Legislature may also fix the amount of taxation, define the boundaries of the district; reduce or raise the drainage tax assessed against the lands in the district, and may also divide the district into zones and provide for the amount to be levied in each zone, as well as determine the benefits to be derived by the lands in the different zones by the improvements proposed.
5. There are no allegations in the bill of complaint which would warrant the court in granting the relief prayed. It appears from the allegations of the bill that there are four and a half million acres of land in this drainage district, and that five acres of same belonging to appellant was hammock or upland, and would receive no benefit whatever from the proposed work of drainage and other improvements provided for in and by said Act. We cannot conclude from the allegations that the assessment made by the Legislature, directly, is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power.

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6. Where the Legislature enacts a drainage law, like the one herein involved, it is not necessary for the lawmaking body to embrace in the Act a provision for any notice of hearing by the owners of the land in said drainage district prior to the enactment of the law. The Legislature is presumed to have performed its duty correctly and to have made an investigation for itself and determined for itself, before the passage of the Act, what lands should be embraced within the drainage district, and what assessment should be made, and what benefits would be received by the owners of the land. Where the district is created by the Legislature and the assessment made by that body, and all things done directly by the Legislature, as was done in this case, the Legislative will is supreme, and there can be no question of failure to give notice.
7. Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Acts of 1919, Laws of Florida, is not unconstitutional, and does not deprive the owners of the land in the said drainage district of their property without due process of law. See *Lainhart v. Catts, supra*.
8. There is nothing in Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, relative to issuance of bonds and the assessment of taxes thereunder, nor in Chapter 7862, Laws of Florida, that would impair any of the rights of a purchaser of lands in the drainage district prior to the enactment of Chapter 7862, Laws of Florida, and there is nothing written in Chapter 6957, Laws of Florida, upon which it could be claimed that the rate of taxation on the land in the "Everglades Drainage District" were fixed permanently so that they could not be altered by direct Act of the Legislature in the passage of Chapter 7862, Laws of Florida. The matter of taxation is one which is always subject to change, and every person who purchases real estate in Florida, does so subject to the governmental power and authority to raise or change the taxes, to issue bonds, to create special tax school districts, to create special road and bridge districts, and to create drainage dis-

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tricts, and any and all of which would have the effect of changing or increasing the rate of taxation.

9. The provisions of Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Laws of Florida, are not in conflict with Section 4 of Article IX of the Constitution which provides that "no money shall be drawn from the treasury except in pursuance of appropriations made by law." See *Lainhart v. Catts, supra*.
10. Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Laws of Florida, is not in conflict with Section 16 of Article III of the Constitution. The title to Chapter 6456, Laws of Florida, was involved in the case of *Lainhart v. Catts, supra*, and was upheld by the court in that case, and we can find no defect, or supposed defect, in the title to Chapter 6957, Laws of Florida, and Chapter 7862, Laws of Florida, that was not disposed of in that case. The title of the respective chapters mentioned clearly relate to the creation of a single district, and not a number of drainage districts throughout the State of Florida, and the language in the body of the Act is not inconsistent with anything contained in the title.
11. Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Laws of Florida, is not unconstitutional or invalid. It is claimed that the law interferes with the collection of the State and County taxes, and should be condemned. The claim is not well founded in fact, and counsel in their brief have offered no argument or authorities that would throw any light upon the subject. In the absence of any showing as to why and how the law interferes with the collection of State and County taxes, the court should not declare the law inoperative.

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An Appeal from the Circuit Court for DeSoto County;
Geo. W. Whitehurst, Judge.

Order affirmed.

Atkinson & Burdine, for Appellant;

Glenn Terrell, for Appellees.

WILSON, Circuit Judge.—Robert L. Bannerman, the complainant below, who is appellant here, filed his bill of complaint in the Circuit Court in and for the Twelfth Judicial Circuit of Florida, against the Commissioners of Everglades Drainage District, a corporation under the laws of the State of Florida, and against Cyril Baldwin, Tax Collector of DeSoto County, and H. G. Murphy, as Tax Assessor of DeSoto County, and G. Hunter Bryant, Tax Assessor of Lee County, and P. John Hart, as Tax Collector of Lee County, for the purpose of enjoining the said defendants from levying and collecting the Everglades District tax on certain lands of the complainant, which are alleged to be embraced within the limits of the Everglades Drainage District, and also for the purpose of praying the court to “declare Chapter 6456 of the Acts of 1913, as amended by 6957 of the Acts of 1915, as amended by Chapter 7862 of the Acts of 1919, Laws of Florida,” to be unconstitutional and void.

The bill of complaint is quite voluminous and quotes in substance practically every section of the said chapters just above mentioned which are involved in this suit. As these laws are accessible to every one, we see no good reason for copying the said bill of complaint into this decision, but will only refer to such sections of the said chapters as may from time to time be considered neces-

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sary in order to make this opinion intelligible. The bill alleges that about four and a half million acres of land are embraced in this Everglades Drainage District, and then proceeds to describe three parcels of land therein which the complainant alleges is his property. The first description designated as tract No. 1 is as follows:

The south half of the northeast quarter of the south-east quarter of section seven, in township forty south, range thirty-three east, containing twenty acres, more or less.

And the second description designated as tract No. 2 is as follows:

Beginning at the southeast corner of the northeast quarter of section twenty-five, in township forty-two south, of range twenty-nine east, thence run north four hundred and sixty-six feet; thence west four hundred and sixty-six feet; thence south four hundred and sixty-six feet; thence east four hundred and sixty-six feet to the point of beginning, containing in all five acres, more or less.

While that part described as tract No. 3 is as follows:

Beginning at the northwest corner of section twenty-nine, in township forty-three south, of range thirty-two east, thence run south four hundred and sixty-six feet; thence east four hundred and sixty-six feet; thence north four hundred and sixty-six feet; thence west four hundred and sixty-six feet to the point of beginning, containing five acres, more or less.

The bill further alleges, in substance, that as to the last tract above designated as tract No. 3, and containing five acres, more or less, against which there is a drainage tax assessed under the provision of the said laws of 25c that this five acres is dry hammock or upland, and cannot and

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will not receive any benefit, whatever, from the proposed work by drainage and other improvements provided for and by said acts; and the bill further alleges that other of the complainant's aforesaid lands were partly swamp and overflow, but portions thereof are dry hammock lands and prairie lands, but the bill does not alleges what part of the complainants other lands are swamp and overflow, nor what parts high and dry.

It is also sought by said bill of complaint to test the validity of the bonds authorized to be issued under the provisions of the said chapters above mentioned; and it is further urged that the said acts of the Legislature, and the attempted levy, assessment and imposition of the said drainage taxes thereby provided, violate the Constitution of the State of Florida in the following particulars.

(1) That the said acts are special or local laws, prohibited by Sections 20 and 21 of Article III of the Constitution, because

(a) They regulate the duties of State officers in respect to a special and limited locality which is not co-extensive with the limits of any County of the State or of the State and cannot under any circumstances be uniform in their operations throughout the State of Florida.

(b) That said Acts, including Chapter 7862 of the Acts of 1919, Laws of Florida, impose upon the tax assessors and tax collectors of such counties as comprise the Everglades Drainage District, described in and prescribed by said Chapter 6456, as amended by Chapter 6957, as amended by Chapter 7862, of the Laws of Florida, special jurisdiction and duties not possessed by or conferred upon same officers in other counties.

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(c) They provide for making and levying a special assessment of taxes and provide for the collection thereof for State and County purposes in such counties as comprise the said Everglades Drainage District established by said Chapter 6456, as amended by Chapter 6957, as amended by Chapter 7862 of the Laws of Florida.

(d) The drainage taxes provided for by said Acts are not imposed for any State, County or Municipal purpose.

(2) That the said Chapter 6456, as amended by Chapter 6957, as amended by Chapter 7862, of the Laws of Florida; violates Article 9 of the Constitution of the State of Florida, in that it defines and imposes a system of taxes, which

(a) Is not based on a uniform valuation or equal rate.

(b) Is imposed only upon a special class or description of property arbitrarily and without just cause or reason selected and designated therein or thereby, and not by any officer or officers of the State of Florida or of any county or municipality of said State.

(c) Is a tax imposed and levied by law and not so imposed in pursuance of law.

(d) Is not assessed, imposed or levied upon the principles established by the Constitution for State taxation.

(e) Is imposed without regard to the valuation of the property taxed.

(f) Arbitrarily divides the lands of the said district into four classes or divisions against which a different and discriminatory tax is imposed, except as to one of

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said classes or divisions, against which no tax is imposed.

(g) Is based upon acreage and not upon valuation.

(h) Is a specific tax imposed upon certain described lands in said district, whereas, under the provisions of the Constitution of the State of Florida, taxes upon lands can only be levied upon an ad valorem basis.

(i) Levies and imposes a different tax upon different lands in the said district for the same purpose upon an acreage basis.

(j) Provides that the money raised from said taxes shall be turned over to the State Treasurer without any appropriation thereof made by law in violation of Section 4 of Article 9 of the Constitution of Florida.

(3) Under said Chapter 6456, as amended by Chapter 6957, as amended by Chapter 7856, Laws of Florida, the Legislature attempted to usurp the powers conferred by the Constitution upon other than legislative officers.

(4) The Legislature is vested by the Constitution with power to provide for the assessment and levy and collection of taxes, and to provide regulations to secure a just valuation of property for taxation, but is vested with no power to impose or assess any but a license or occupational tax.

(5) That the subject of the said Chapter 6456, or Chapter 6957, or Chapter 7862, of the Laws of Florida, is not properly expressed in its title, as required by Section 16 of Article 3 of the Constitution of Florida, because

(a) The title of said Act relates to and contemplates a general law for the establishment of drainage districts throughout the State of Florida and the levy of taxes

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thereon, whereas said Act establishes only a single drainage district by specific description and levies an annual acreage tax on certain lands in said district. .

(b) The title of said Acts indicate and assume a general law, whereas the body of said Acts is local and special in application.

(c) The title of said Acts provide for the assessment of lands to be benefited by assessment of benefits and taxation, whereas the body of said Act does not provide for assessment of benefits, but levy and impose a special and local tax for a special and local purpose and authorizes the same to be included in State and County taxes, whereas the said Acts require the tax collector to collect such special and local tax along with said State and County taxes, thereby interfering with the collection of said State and County taxes.

(6) Said Acts provide for the taking of private property by the said Board of Commissioners of Everglades Drainage District for the use of the said Board and of the said District without compensation prior to and without condemnation proceedings.

(7) Said Acts assess and impose a special and local tax for a special and local purpose and authorize the same to be included in the State and County Tax Rolls and require the tax collector to collect such special and local tax along with said State and County taxes, thereby interfering with the collection of said State and County taxes.

(8) Said Acts declare that the said tax is imposed for draining and reclaiming the lands in said District and protect the same from the effects of water for agricultural and sanitary purpose, for the public convenience and welfare, and for the public utility and benefit, where-

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as great portions of the said lands in the said Drainage District upon which said tax is imposed require no draining, reclaiming or protection from the effects of water and can in no wise be benefited by the proposed works to be constructed by the said Board in said District.

Said Acts and proceedings of the said Board of Commissioners of Everglades Drainage District and of the said defendant tax assessors and tax collectors thereunder violate Sections 1 and 4 of the Bill of Rights and Section 29 of Article 16 of the Constitution of the State of Florida, because

(1) Said Chapter 6456, as amended by Chapter 6957, as amended by Chapter 7862, of the Laws of Florida, does not provide for any notice or hearing of your Orator or other owners of lands in said Drainage District, or for an opportunity of a hearing of your orator and of other owners of lands in respect to the selection of the lands assessed under said Acts or upon which the said acreage tax is imposed, and that the Legislature, under said Acts, has arbitrarily and without a hearing or opportunity for a hearing attempted to impose such acreage tax on lands of your Orator and other owners of lands within said District without regard to the condition, character, quality or value of such lands respectively.

(2) The Legislature by the imposition of such tax has arbitrarily imposed upon lands of equal and uniform value in said District a different rate of taxation and exempted other lands within said District from any such tax.

(3) Said Acts are void as being in contravention of divers provisions of the Bill of Rights and Constitution of the State of Florida, and therefore the said Legislature, the said Board of Commissioners of Everglades

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Drainage District and the defendant tax assessors and tax collectors, in the levy and attempted levy and collection of said tax, are attempting to deprive your Orator of his said property without due process of law and are denying to your Orator the protection of the law.

(4) That the said assessment, imposition and levy of taxes are not based upon benefits to the lands of your Orator, or upon any definite or stated principle or rule of taxation, and constitute a mere arbitrary exaction levied by said Legislature upon your Orator's aforesaid property in violation of the Constitution of the State of Florida.

(5) The said Acts and each of them are all special laws which discriminate unequally between persons and property of the same condition, resulting in depriving your Orator of his property without due process of law and denying to him the equal protection of the law.

(6) Said Acts do not levy and impose an equal and uniform acreage tax upon lands similarly and equally benefited by the improvements and proposed improvements to be constructed thereunder or upon all of the lands within said Drainage District, but only upon a special, arbitrarily selected, class or kind of property and at special and arbitrarily fixed rates of taxation.

(7) That the said Acts and the proceedings of the said Board and of said tax assessors in attempting to levy said acreage tax upon the lands of your Orator in other respects denies to your Orator the equal protection of law and deprives him of due process of law.

(8) That Chapter 7862, of the Acts of 1919, Laws of Florida, arbitrarily, and without regard to benefits to be derived from drainage, changes the boundaries of the

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Everglades Drainage District, incorporates lands of your Orator and others therein, and imposes taxes thereon, though the said lands could never derive any benefit from being incorporated within the said District.

(9) Chapter 7862, of the Acts of 1919, Laws of Florida, arbitrarily changes and materially enlarges the taxes and assessments imposed upon certain lands within the Everglades Drainage District of Florida, including the lands of your Orator, without due regard to the benefits to be derived from such increased taxation.

(10) Chapter 6456, as amended by Chapter 6957, of the Laws of Florida, laid down specific provisions for the issuance of bonds and the assessment of taxes thereunder, while Chapter 7862, of the Laws of Florida, repeals all the provisions of the said Chapter 6456 as amended by Chapter 6957, of the Laws of Florida, relative to the issuance of bonds and the assessment of taxes, thereby impairing a vested right of your Orator and other purchasers of land within the Everglades Drainage District, they having purchased with the understanding that the rates of taxation were fixed thereon.

(11) Chapter 7862, of the Laws of Florida, is in violation of Section 17 of the Bill of Rights and of the Constitution of Florida.

(12) Chapter 7862, Acts of 1919, Laws of Florida, enlarges the Everglades Drainage District by making arbitrary extensions thereof, including narrow strips in the nature of pan-handles along each side of the several canals leading therefrom, such enlargements being made without any regard to drainage or benefits derived therefrom.

(13) Your Orator purchased his said land with a fixed acreage price imposed thereon for drainage and

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other purposes for a definite period, while Chapter 7862, of the Laws of Florida, arbitrarily imposes a different and much larger tax in violation of the rights of complainant.

(14) The enlargements to the Everglades Drainage District under Chapter 7862, of the Laws of Florida, while including lands of your Orator herein described, includes the lands of others, a large portion of which are among some of the highest pine lands in the State that could under no circumstances be benefited by the drainage operations provided therefor.

(15) Chapter 7862, of the Laws of Florida, revises the tax scheme for drainage purposes upward on the lands of your Orator as imposed under Chapter 6456, as amended by Chapter 6957, of the Laws of Florida, such revision and imposition of the said tax as provided in said Chapter 7862 being equivalent to a confiscation of the lands of your Orator.

(16) Chapter 7862, of the Laws of Florida, deprives your Orator of vested rights granted to him under the provisions of Chapter 6456, as amended by Chapter 6957, of the Laws of Florida.

(17) Chapter 7862, of the Laws of Florida, is in other respects arbitrary, unconstitutional and violative of the rights of your Orator and others in like situation.

It will be noted that the complainant does not allege any irregularity or improper conduct of the members of the Board of Everglades Drainage District, or upon the part of the assessors and collectors who are joined as defendants, but the sole attack is upon the constitutionality of the said acts of the Legislature of 1913, and amendatory Acts subsequent thereto.

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The defendants demurred to the bill of complaint, which demurrer, omitting the formal beginning and conclusion, embraces the following grounds:

1.

That the complainant in and by his said bill has not stated a cause of action on which the relief sought therein can be granted.

2.

It appears from the allegations in the said bill of complaint exhibited herein that the complainant is not entitled to the relief prayed for, or in fact to any relief.

3.

It is not made to appear from the allegations in the bill of complaint that Chapter 6456 of the Acts of 1913 or any of the amendments thereof are violative of sections 20 and 21 of Article 3 of the Constitution of the State of Florida as charged in the said bill.

4.

It affirmatively appears from the allegations in the said bill that Chapter 6456 of the Acts of 1913 or any amendment thereto is not violative of Sections 20 and 21 of Article 3 of the Constitution of the State of Florida.

5.

It is not made to appear in the said bill of complaint that Chapter 6456 of the Acts of 1913 or any amendment thereof is violative of Article 9 of the Constitution of Florida or any section or part thereof.

6.

It affirmatively appears from the allegations in the said bill of complaint that neither Chapter 6456 of the Acts of 1913 or any amendment thereof is violative of Article 9 of the Constitution of Florida or any section or paragraph thereof.

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7.

It is not made to appear from the allegations in the said bill of complaint that Chapter 6456 of the Acts of 1913 or any amendment thereof is in violation of Section 16 of Article 3 of the Constitution of Florida as charged in the said bill.

8.

It affirmatively appears from the averments of the bill of complaint exhibited herein that neither Chapter 6456 of the Acts of 1913 or any amendment thereto contravenes Section 16 of Article 3 of the Constitution of Florida as charged in the said bill.

9.

It is not made to appear from the allegations in the said bill of complaint that Chapter 6456 of the Acts of 1913 or any amendment thereof is violative of Sections 1 and 4 of the Bill of Rights of the Constitution of Florida.

10.

It affirmatively appears from the allegations in the bill of complaint exhibited herein that neither Chapter 6456 of the Acts of 1913 or any amendment thereof is violative of Sections 1 and 4 of the Bill of Rights of the Constitution of the State of Florida as charged in the said bill.

11.

It is not made to appear from the allegations in the bill of complaint exhibited herein that Chapter 6456 of the Acts of 1913 or any amendment thereof is violative of Section 29 of Article 16 of the Constitution of the State of Florida as charged therein.

12.

It affirmatively appears from the allegations in the bill of complaint that neither Chapter 6456 of the Acts of 1913 or any amendment thereof is obnoxious to Section

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29 of Article 16 of the Constitution of the State of Florida.

13.

It is not made to appear from the allegations of the bill of complaint exhibited herein that Chapter 6456 of the Acts of 1913 or any amendment thereto is in conflict with any provision of organic law.

14.

The tax or assessment complained of is imposed upon the lands of complainant and all other lands in the Everglades Drainage District to accomplish those results which are conducive to public health and the public welfare and convenience of the people of the State of Florida, and our constitutional provisions defining equality and uniformity of tax burdens are not applicable to such tax or assessment.

15.

The tax or assessment referred to in the bill of complaint is imposed for the benefit of the lands in the Everglades Drainage District of Florida in order that the said district may be made habitable and useful, and the imposition of such tax or assessment is not prohibited by any provisions of Article 9 of the Constitution of Florida.

16.

The tax or assessment complained of is a special assessment for local benefits which is not obnoxious to any provision of the State or Federal Constitutions.

17.

The State and Federal Constitutions have no reference to special assessment and where the legislative will is not thus restricted it may impose such assessment as within its judgment is proper.

18.

It affirmatively appears from the allegations in the

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bill of complaint that Chapter 7862 of the Laws of Florida did not impair any vested right of the complainant herein nor in said Chapter 7862 in violation of any provision of the Constitution of this State.

19.

The allegations in the bill of complaint do not show that Chapter 7862 of the Acts of 1919, Laws of Florida, changed or altered the boundaries of the Everglades Drainage District without regard to drainage benefits or in a manner that would in any way prejudice or affect any vested right of the complainant.

20.

Chapter 6456 and Chapter 7862, of the Laws of Florida, affirmatively show that the Legislature of this State had the authority and discretion to at any time it saw fit enlarge, reduce or change the boundaries or assessments imposed on the lands within the Everglades Drainage District so long as vested rights were not materially affected.

21.

It affirmatively appears from the allegations in the bill of complaint that no right given the complainant under Chapter 7862 or Chapter 6456 or any amendments thereto have been arbitrarily affected and that in all things pertaining to the said Everglades Drainage District and the interest of property holders therein the Legislature of the State has at all times acted within the discretion imposed and vested in it.

On the 28th day of February, 1920, the chancellor entered an order sustaining the demurrer to the bill of complaint, and allowing until the rule day in March, 1920, to amend the bill. The complainant did not amend, but entered his appeal to this court. The only assign-

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ment of error is that the court erred in sustaining the demurrer of the defendants to the complainant's bill of complaint.

Chapter 6456, of the Acts of 1913, Laws of Florida, as amended by Section 1 of Chapter 7862, of the Acts of 1919, Laws of Florida, provides for the establishment of the "Everglades Drainage District," for the purpose of protecting the lands embraced therein from the effects of water, for agricultural and sanitary purposes, and for the public convenience and welfare, and for the public utility and benefit. This section then proceeds to describe the lands to be embraced within the said drainage district.

It is too well settled to admit of any argument that the drainage and reclamation of swamp and overflow lands are a proper exercise of legislative authority. *Lainhart vs. Catts, et al*, 73 Fla. 735; *Hagar vs. Reclamation District 108*, 111 U. S. 701; *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112; *Neal vs. Vansicke, et al*, 100 N. W. 200; *Houck vs. Little River Drainage District*, 239 U. S. 254; *Mittman vs. Farmer, et al*, 1915C Ann. Cas., page 1; *Stewart vs. DeLand Lake Helen Road and Bridge District*, 71 Fla. 158; *Hopkins vs. Special Road & Bridge District No. 4*, 73 Fla. 241; *Kroegel, et al, vs. Whyte, et al*, 62 Fla. 527. In this case this power, inherent in the Legislature, is not denied, but it is claimed that the power was not exercised in harmony with the constitutional provisions of this State. Appellant claims that the provisions of Chapter 6456, Acts of 1913, Laws of Florida, as amended by Chapter 7862 of the Acts of 1919, Laws of Florida, are in conflict with sections 20 and 21 of Article 3 of the Constitution of Florida, the basis of his claim being that these are special or local acts within

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the meaning of the Constitution and are, therefore, void. We do not think this position is tenable. The same question was directly involved in the case of *Lainhart vs. Catts, et al*, 78 Fla., and was disposed of by this court on page 748 of said report adversely to the contention of counsel for appellant, and no good reason has been advanced why this former decision should be modified.

It is claimed that the statute creating and governing the Everglades Drainage District violates that part of Section 20 of Article 3 of the Constitution prohibiting the Legislature from passing local or special laws, relative to the jurisdiction and duties of any class of officers, excepting municipal officers, and regulating fees of officers of the State and County. It must be remembered that the drainage district in question is established directly by the Legislature of the State, its creation not being delegated to any local boards or commissions, and that the assessments or charges upon the land are fixed and imposed directly by the Legislature and are not left to the judgment or discretion of any board or commission to be ascertained and fixed. We have already passed upon this question in *Lainhart vs. Catts et al.*, *supra*, holding that "the duties and jurisdiction or power of the officers in question do not differ in nature or kind from those of a like class of officers in the State; the difference is in degree, not kind." We also said "the establishment of the drainage district being within, and a valid exercise of, the legislative power, the duties and compensations provided for by these acts are "a mere incident to and the necessary concomitant with the power" we have held above to exist in the Legislature to establish the drainage district and to carry out the purpose for which it was established." *Lainhart vs. Catts et al.*, *supra*;

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Kroegel vs. Whyte, 62 Fla. 527. Having already upheld the law on this point, we find no occasion to change our opinion.

It is further claimed by the appellant that the said acts violate the provisions of Sections 1, 2, 3 and 5 of Article 9 of the Constitution in that they provide for taxation which is not based upon a uniform and equal rate. This court several times has held that there is no express provision in the State Constitution as to special assessments, nor is there any express provision therein as to the formation of taxing districts for particular purposes. *Stewart vs. DeLand-Lake Helen Road and Bridge District*, 71 Fla. 158; *Edwards vs. City of Ocala*, 58 Fla. 217. *Lainhart vs. Catts et al.*, 73 Fla., text page 749; and the statutes creating taxing districts for the purpose of providing for construction and maintenance of public highways and the drainage of lands are within the power of the Legislature to enact and there is no constitutional inhibition against such enactments, for where a statute does not violate the Federal or State Constitution the Legislative will is supreme and its policy is not subject to review by the court, whose province is not to regulate, but to effectuate the policy of the law as expressed by valid statutes." *State vs. Atlantic Coast Line Ry. Co.*, 56 Fla. 617; *Davis vs. Fla. Power Co.*, 64 Fla. 246. The assessment made under the Act here involved is a special assessment for local benefits, and does not come within the provisions of Sections 1, 2, 3 and 5 of Article 9 of the Constitution. It is further claimed that the levy is made arbitrarily and without regard to the benefit which might be derived. We have already held in *Lainhart vs. Catts et al.*, *supra*, that Sections 2, 3 and 5 of Article 9 of the Constitution apply only to general taxation for State, County and Municipal purposes, and have no reference

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to special assessments for local purposes. In creating this drainage district the Legislature has divided the lands into districts, upon which the taxes are levied, into four classes or zones for the purpose of apportioning such tax burden in proportion to the special benefits which said lands will receive from the proposed improvements. As was said in *Lainhart vs. Catts et al.*, *supra*, "while the rate varies as to each zone, yet it is equal and uniform as applies to every acre in each zone; no discrimination in favor of any particular acre or tract in any one class or zone being made. Whether or not this method of apportionment is the most just and equitable that can be devised, it is not within the province of the judiciary to determine." True whether the tax be a special assessment for local improvements, or whether it be for general taxation, the taxes must be uniform in the sense that it must be imposed upon the property subject to taxation or special assessment, so that the burden or charge on every parcel of land will bear a just proportion as that imposed on every other; *Lainhart vs. Catts et al.*, *supra*. However, it is presumed that the Legislature in enacting the statute duly performed its duty. There being no constitutional prohibition against the passage of such statute, the act is valid, and the Legislature was, and of necessity must have been, the judge of the amount of taxes to be levied in each zone; the number of zones to be provided for, and the benefits to be derived from the lands in the different zones by the improvements proposed. Having done this it is not within the province of the Court to substitute its will for the will of the Legislature. "The Court must assume that in imposing local assessments, whereby the value and desirability of the land will be increased, the Legislature designed to distribute the cost thereof upon the land in proportion to the spe-

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cial benefits it would receive from the system of improvements." *Lainhart vs. Catts et al., supra*. It is a well-settled principle that the legislative determination of the benefits derived, or the necessity and advisability of a local or special assessment is conclusive and not subject to review by the courts unless it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power. *Hagar vs. Reclamation District No. 4, supra*; *Spencer v. Merchant*, 125 U. S. 345; *Fallbrook Irrigation District vs. Bradley, supra*; *French vs. Barber Asphalt Paving Co.*, 181 U. S. 324; *State vs. A. C. L. Ry. Co.*, 56 Fla. 617; *Davis vs. Fla. Power Co.*, 64 Fla. 246. The rule as settled in this State in the case of *Lainhart vs. Catts et al., supra*, is as follows: "In the decision of this case we do not hold that the courts are not open to review every exercise of legislative power or determination, for it is said in *Wagner vs. Leser*, 239 U. S. 207; 60 L. Ed. 230, "we do not understand that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land owners, because of arbitrary and wholly unwarranted legislation. "There is a wide difference between a special tax or assessment for local improvements prescribed by the legislative body having full authority over the subject, and one dependent upon the judgment and action of bodies or instrumentalities acting under delegated power." There are no allegations in the bill of complaint which would warrant the court in granting the relief prayed. Referring to the facts, we find that the bill alleges that this Everglades Drainage District embraces about four and a half million acres of land. (p. 51 of transcript). The greater portion of this land is alleged to be swamp and overflowed lands. The bill of complaint shows (p. 52) that one of the tracts

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owned by the complainant embraced within this Everglades district, the tract described as No. 3, containing five acres, more or less, and assessed at 25c, is dry, hammock or upland, and can and will receive no benefit, whatever, from the proposed work of drainage and other improvements provided for, in and by the said acts. Thus we find that out of four and a half million acres of swamp and overflow lands embraced within this drainage district there are only five acres of hammock or upland, belonging to appellant, that are specifically designated and described as land that should not be embraced in the district because it would receive no benefits therefrom. We cannot, therefore, by any reach of the imagination conclude that the assessment made by the Legislature is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power.

It is argued by the appellant that Chapter 7862, Laws of Florida, changed the boundaries of the former drainage district and revised his taxes for drainage purpose upwards on his lands embraced in the said district. It is immaterial whether the district created by Section 1, Chapter 7862, placed a higher assessment on the lands embraced in the district or not. It has already been stated that the Legislature had the power to pass this law. Having the power to pass it, it also had the power to fix the amount of the assessments, and the power to fix the lines or boundaries wherever it saw fit so long as it did not overstep the bounds of reason so as to make the law arbitrary and an abuse of power. See *Lainhart vs. Catts et al.*, *supra*, text page 755; *Houck et al. vs. Little River Drainage District*, *supra*.

It is further claimed in the bill of complaint that said Chapter 6456, as amended by Chapter 6957, as amended

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by Chapter 7862, of the Laws of Florida, does not provide for any notice or hearing by the owners of lands in said drainage district nor give them an opportunity of a hearing in respect to the selection of the lands assessed under said acts or upon which said acreage taxes are imposed, and alleges that the Legislature acted arbitrarily and without a hearing on the part of the said owners of lands within the said drainage district. This position is not in harmony with the law. There is no provision of the law whereby the Legislature was required to give the owners any notice before enacting the law. The Legislature being presumed to have performed its duty correctly is presumed to have made an investigation for itself and to have determined for itself, before the passage of the act complained of, what land should be embraced within the drainage district and what assessment should be made and what benefits would be received by the owners of the land. The question is not one of a delegation of authority by the Legislature to some board or commission to levy the assessment, for under a delegation of the power to some other instrumentality or board it is probable that notice would have been necessary to the owners, but where the district was created by the Legislature, and the assessment was made by the Legislature, and all things done directly by the law-making body, as was done in this case, the legislative will is supreme and there can be no question of failure to give notice. *Fallbrook Irrigation District vs. Bradley, supra; Lainhart vs. Catts, supra; Wagner vs. Baltimore, 239 U. S. 207.*

It is further claimed by the appellant that this act deprives him of his property without due process of law. We do not think this complaint is well founded, for if the act of the Legislature is valid and not in contravention of any of the provisions of our Constitution or the

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Federal Constitution, then it cannot be said that it deprived the appellant of due process of law. "The provisions of the organic law that no person shall be deprived of life, liberty or property without due process of law, nor denied the equal protection of the laws, are not intended to hamper the State in the discretionary exercise of any of their appropriate sovereign governmental powers unless substantial private rights are arbitrarily invaded by illegal or palpably unjust, hostile and oppressive exactions, burdens, discriminations or deprivations." Courts have no power to annul a legislative enactment on the ground that it is unreasonable in its terms or in its operation, when the statute does not, because of arbitrary unreasonableness, conflict with the superior force of the Constitution as to higher law." *Dutton Phosphate Co. vs. Priest*, 67 Fla. 371; *Wagner vs. Baltimore*, 239 U. S. 207. *Houck et al. vs. Little River Drainage District*, *supra*.

It is argued by the appellant that Chapter 6456, as amended by Chapter 6957, of the Laws of Florida, lay down specific provisions for the issuance of bonds and the assessment of taxes thereunder, while Chapter 7862 of the Laws of Florida repeals all of the provisions of the said Chapter 6456, as amended by Chapter 6957, Laws of Florida, relative to the issuance of bonds and assessments of taxes, thereby impairing a vested right of appellant, he having purchased with the understanding that the rate of taxation was fixed thereon. The appellant does not give a clear or definite statement as to how he obtained such an understanding. It is not stated whether he had this understanding with the party from whom he purchased or whether with some State official, or whether he got this understanding from Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of

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Florida. In either case the objection of the appellant to the statute would be futile. There is nothing written in Chapter 6957, Laws of Florida, upon which the appellant could base a reasonable claim that the rates of taxation on the land he purchased were fixed forever. These are matters which are always subject to change, and every person who purchases real estate in Florida does so subject to the governmental power and authority to raise or change the taxes, to issue bonds that would be a lien on the land, to create special tax school districts; and to create special road and bridge districts, any and all of which would have the effect of increasing the rate of his taxation.

The appellant further claims in his bill that Section 4 of the said act conferring the power of eminent domain is unconstitutional because it is alleged to be in violation of Section 29, Article 16, of the Constitution. This identical question was before the court in the case of *Lainhart vs. Catts*, supra, and the court held that it was useless to determine the question, as no fact was alleged in the bill involving the exercise of this right. The same situation exists in the present case, for there is no allegation in the bill of complaint alleging any right of the appellant is being invaded under this section; therefore, it is useless to pass upon the question of whether Section 4 is unconstitutional or not. As said in *Lainhart vs. Catts* case, "The Court will not pass upon the constitutionality of a part of an act in a proceeding which does not involve the part which is claimed to be unconstitutional, if the part remaining is complete and operative within itself."

The complainant further objects to the said statute because the act authorizes the drainage commissioners to expend the proceeds derived from the special assessments

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without a special appropriation of the Legislature is in violation of Section 4, Article 9, of the Constitution, providing "that no money shall be drawn from the treasury except in pursuance of appropriations made by law." This identical question was raised in the case of *Lainhart vs. Catts et al.*, *supra*, text p. 756, and was decided by the court adversely to the contention of the appellant here, and we see no reason for a repetition.

The objection that the title to the Act is in contravention of Section 16 of Article 3 of the Constitution is not well founded. It is claimed that the title to the Act relates to and contemplates a general law for the establishment of drainage districts throughout the State, and that the body of the Act establishes only a single drainage district. This contention is unwarranted by the facts. We have carefully examined the respective titles to Chapters 6456-6597 and 7862, and none of them refer to the creation of more than one drainage district. The title to Chapter 6456 was involved in the case of *Lainhart vs. Catts, et al.*, *supra*, text 757, and it was upheld by the court in that case, and we can find no defect, or supposed defect, in the title to Chapters 6957 and 7862 that was not disposed of in that case. The appellant may have been misled because of the language in Chapter 6456 reading as follows, "An Act to establish the Everglades Drainage District in this State," and by the language in the title to Chapter 6957, which is a repetition of that just quoted, and by the language in the title to Chapter 7862, which reads as follows, "Relating to the creation of the Everglades Drainage District of the State of Florida." It will be noticed, however, that immediately following this language in each title are the words "defining *its* boundaries." It is quite clear, therefore,

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that the title of the Act refers to the creation of a single drainage district, and not a number of drainage districts in the State of Florida. If the drainage district had been intended to cover drainage districts throughout the entire State of Florida, the title would not have contained the words "defining *its* boundaries." The language in the body of the Act is not in any manner inconsistent with anything contained in the title. It has already been held by this court that "if the title of an Act fairly gives notice of the subject of the Act so as to reasonably lead to an inquiry into the body thereof, it is all that is necessary." The title need not be an index to the contents of the Act. *Butler vs. Perry*, 67 Fla. 406; *Moodie vs. Bryan*, 50 Fla. 293; *Lainhart vs. Catts, et al supra*.

Counsel for appellant in their brief complain that the said Acts require the tax collector to collect the local tax along with the State and county taxes, and that the local tax is put on the tax roll and collected at the same time that county taxes are collected, and the collector is not authorized to collect the county taxes without collecting this drainage tax; and then the brief contains this further assertion, "This interferes with the collection of the State and county taxes, and should be condemned." If by this claim counsel are seeking to show that the State and county taxes are intermixed and intermingled with the drainage tax, then, we can only say that counsel are mistaken in the facts. The statute Section 1 of Chapter 7305, Laws of Florida, provides for the method of assessment of drainage taxes, and says, "such tax or assessment shall be entered upon the tax roll in a separate column, under the head of 'Drainage Taxes,' opposite the name of the person or persons or corporation owning such land," except where the lands are not returned for assessment by the owner or his legal

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representative, and in that case, to be assessed as "unknown." This fixes the method so that the drainage tax is segregated from the State and county tax, and we do not think it is subject to the objection argued. Neither is it the law that the tax collector cannot collect the drainage tax without collecting the State and county taxes, nor that the Collector cannot collect the State and county tax without collecting the drainage tax, for in Section 10 of Chapter 6456, as amended by Chapter 6957, as amended by Chapter 7304, Laws of Florida, it is provided that "said tax collector is authorized to receive drainage taxes and issue receipts therefor without requiring the payment of other taxes at the time of payment of such drainage taxes." The sale is also entirely separate and distinct. The lien given is not superior to the lien for State and county taxes, and we are unable to see where this law interferes with the collection of State and county taxes, and counsel in their brief have offered no authorities or argument which would throw any light upon the subject. In the absence of any showing as to why and how the law interferes with the collection of State and county taxes, we deem it proper to hold that the position of counsel in this respect is not well taken.

Finding no error in the ruling of the court in sustaining the demurrer to the bill of complaint, the order of the court below is affirmed.

BROWNE, C. J., AND TAYLOR AND WHITFIELD, J. J., AND PERKINS, CIRCUIT JUDGE, concur.

ELLIS AND WEST, J. J., disqualified.

Boykin v. State of Florida—Syllabus.

WILL BOYKIN, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed July 5, 1920.

1. Where there is some substantial competent evidence of all the facts legally essential to support the verdict and there is nothing in the record to indicate that the jury was not governed by the evidence a refusal of the trial court to grant a new trial on the ground of the insufficiency of the evidence to support the verdict will not be disturbed by an appellate court.
2. A verdict of guilty of assault with intent to commit murder in the second degree upon a charge of assault with intent to commit murder in the first degree will be sustained if the evidence shows an assault with intent to commit murder in the first degree or in the second degree as defined in the statute, since the latter offense is regarded as being included in the former.

A Writ of Error to the Circuit Court for Santa Rosa County; A. G. Campbell, Judge.

Judgment affirmed.

W. W. Clark, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant, for the State.

WEST, J.—This case involves a question of evidence and certain principles of law well settled in this jurisdiction.

Plaintiff in error, Will Boykin, was indicted and tried upon a charge of assault with intent to commit murder in the first degree. He was found guilty of assault with

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intent to commit murder in the second degree. From the sentence imposed he took writ of error.

There is a single assignment of error. It challenges the soundness of the order of the court overruling defendant's motion for a new trial. The grounds of the motion for new trial are (1) that the verdict is contrary to law and not authorized under the indictment; and (2) that the verdict is contrary to the evidence and not supported by it.

The person upon whom the assault is alleged to have been made is Sam Bellamy. At the trial Bellamy testified: "My name is Sam Bellamy; I live out on the hill, just this side of Mr. Rhoda's. I know Will Boykin; I have known him something over 15 years. He and I had some little trouble about the 15th of last September, last year. It was over at the mill—the Mayo Mill. The trouble was, I was running the edger and he was running the rollers; I got fouled in the lumber and I run over there and asked him to stop the rollers until I could get it unfouled; he said no, he was not going to stop it; he said it was none of my business. I asked him to stop it until I could get unfouled. I said that was no way to do, I said you just naturally contrary and too bigoted, I sees Mr. Whitmire coming and turns to go back to work and he strikes me with this pick. This is where he hit me. I will show it to the jury, that is where he hit me. Made that hole right there. There is a place in there the doctor says, yes sir, the doctor had to put in a plate. Doctor Payne treated it for me at the Pensacola Hospital. He hit me with that pick over there. Yes, sir. That is the same pick, I have seen it over there. I don't know how he hit me—I won't be so sure about that, Dr. Carter said he stuck it in, he waited on me, he took me to Pensacola,

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he said he stuck it in. Didn't go that way—stuck it in this way.”

Perry Whitmire, for the State, testified: “My name is Perry Whitmire, I live in Milton here. I know Sam Bellamy and Will Boykin. I was out at the Mayo Mill at the time they had some trouble some time last September. I was somewhere about thirty feet away when they had the trouble. I first noticed it about a minute, I guess, before I saw Sam with his head split. I saw Sam talking to Boykin. I didn't know there was any trouble between them. He was leaning over some pieces of lumber two or three feet apart. The lumber comes out here (indicating) Sam was at the edger. Sam Bellamy had his hands on his lumber on his side and Will was standing on the other side of Sam's lumber talking to him. I suppose Sam's boards were about that high. Well, I made a step to another fellow and I looked around and saw Bellamy coming with his head split, and I saw Boykin coming with a lumber pick in his hand.”

Douglass Collins, for the State, testified: “My name is Douglass Collins. I live across the river. I know Sam Bellamy and Will Boykin. I knew them both about the 20th day of September, last year; I was down at the Mayo Mill at the time they had that little trouble. I was about twenty or twenty-five feet from them. Well, I was about as far from them as from me to where that man is standing in the jail (indicating). The first thing I noticed him and Will was standing up there talking. I didn't see Sam doing anything to him. Sam didn't do anything to him—Sam went to turn and Will hit him with the pick. He was kind of turned sideways to him, he hit him kind of this way. I didn't notice which way the pick was turned. I think he hit him with the back of it—I thought

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he did. Sam staggered on across the mill. Will run over there to him. Sam staggered across the mill and Will run over there to him where he was at. Will jumped back from him then and Sam run around and picked up the axe. About that time I couldn't see them for a while because they were back of the edger and then Will came around—I didn't see him any more until he came further around the edger and came around the buttonsaw.. That is where Brown was. I didn't see Sam doing anything to him at all, hitting him or slapping him. I didn't see him do anything to him at all—I didn't see him strike him at all. Didn't see him make any demonstration towards him at all. After they washed the blood off of him Sam went back to the button saw. There was an axe lying there and Sam picked up the axe then and started towards Will, where he was working, and then Will taken both the picks and jumped up on the roller bed."

The physician, Dr. Albert Carter, who examined the wound inflicted, testified: "My name is Albert Carter. I am a physician, I am engaged in the actual practice of medicine and surgery. I know Sam Bellamy, been knowing him for several years. I remember the time when it was said he was struck by a man named Will Boykin. I examined his head at that time. The wound was in the right temporal region. I think it was on the right side. It was a lacerated, contused wound, involving two layers of bone and went into the brain. It showed that it was made with a sharp instrument—it was a punctured wound, it was done with a sharp instrument. The nature of the wound showed that it could have been made with an instrument such as this (referring to pick, which was exhibited to witness.)"

Ernest Cross, the first witness in behalf of defendant,

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testified: "My name is Ernest Cross. I know these two darkies, Will Boykin, and Sam Bellamy. I was working down at the mill at the time they had the difficulty. I was working over about sixty feet from Will Boykin's place of work—something like that. Yes, sir, a little bit longer than this courtroom. Around sixty feet is the nearest I can guess at it. Will Boykin and Sam Bellamy worked about ten feet apart. The first thing I noticed between them was—just before the trouble began—Bellamy got up and walked from his job and was shaking his finger in his face and he turned around to walk off—well he turned around—I don't know whether he turned around to walk off or not, and Will hit him. The mill was making a noise. As Will struck him he shoved him on around, followed him on around the edger. He turned around and came back there and stopped and Bellamy picked up an axe and started after him that way and two or three more boys got in across there and then Bellamy started off this way (indicating), this end of the mill."

There is other evidence to the same effect. It appears in the testimony of plaintiff in error that there had been trouble before this time between him and Bellamy, and the jury may have concluded that there was still bad blood between them.

No benefit would be derived from an attempt to follow in this opinion the interesting discussion of counsel with respect to the legal principle which he conceives to be involved.

The frequently reiterated rule is that where there is some substantial competent evidence of all the facts legally essential to support the verdict and there is nothing in the record to indicate that the jury was not governed by the evidence a refusal of the trial court to grant a new

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trial on the grounds of the insufficiency of the evidence to support the verdict will not be disturbed by an appellate court. *Messer v. State*, 75 Fla. 619, 78 South. Rep. 680; *Barrentine v. State*, 72 Fla. 1, 72 South. Rep. 280; *McClellan v. State*, 66 Fla. 215, 63 South. Rep. 419; *Smith v. State*, 66 Fla. 135, 63 South. Rep. 138.

It is equally well established here that a verdict of guilty of assault with intent to commit murder in the second degree upon a charge of assault with intent to commit murder in the first degree will be sustained if the evidence shows an assault with intent to commit murder in the first degree or in the second degree as defined in the statute, since the latter offense is regarded as being included in the former. Sec. 4007, Gen. Stats. 1906, Compiled Laws 1914; *Grace v. State*, 78 Fla. 486, 83 South. Rep. 271; *Jones v. State*, 75 Fla. 533, 82 South. Rep. 777; *Feagle v. State*, 55 Fla. 13, 46 South. Rep. 182; *McCoy and Thomas v. State*, 40 Fla. 494, 24 South. Rep. 485.

There is sufficient basis in the evidence for a verdict either upon the theory that plaintiff in error was guilty of assault with intent to commit murder in the first degree or in the second degree, and an application of the foregoing principles results necessarily in an affirmance of the judgment.

The judgment will be affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Munroe et al. v. Carroll et al.—Syllabus.

ROBERT H. MUNROE, AARON HOGAN, ALICE BROWN,
REUBEN HOGAN AND DELPHA PROCTOR, *Appellants*, v.
FANNIE W. CARROLL, AS EXECUTRIX OF CHARLES T. CAR-
ROLL, DECEASED, AND J. A. MCCLELLAN, *Appellee*.

Opinion Filed July 5, 1920.

1. In a suit in equity against the representative of a deceased person to declare an instrument in the form of a deed of conveyance absolute to be a mortgage, the complainants are not competent witnesses in said suit to testify as to any transactions or communications occurring between them and the said deceased person.
2. Section 1505, General Statutes of Florida, 1906, relating to the competency of witnesses as affected by interests is an enlargement and not a restricting of the common law rule and removed the common law disability of a witness arising from interest in the event of litigation except in those cases when one of the parties to the transaction or communication was at the time of the examination dead or insane.
3. Where under the provisions of Section 2494, General Statutes of Florida, 1906, complainants in a suit against the representative of a deceased person seek to show that a deed absolute in form executed by them was in fact a mortgage the testimony of the complainants concerning their relations with the grantee during his life time, involving communications and transactions with him by which they seek to establish the character of the instrument as a mortgage is not admissible under any exception at common law to the rule prohibiting a party in interest from testifying in a cause.

An Appeal from the Circuit Court for Jefferson County; E. C. Love, Judge.

Decree affirmed.

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W. C. Hodges and Fred H. Davis, for Appellants;

T. T. Turnbull and S. D. Clarke, for Appellee.

ELLIS, J.—The appellants who were complainants below exhibited their bill in the Circuit Court for Jefferson County against Fannie W. Carroll as administratrix of the estate of Charles T. Carroll, deceased, and J. A. McClellan and prayed that a certain instrument in writing appearing on its face to be a deed of conveyance executed by Robert Munroe, Aaron Hogan, and Henry Hogan in December, 1894, to Charles T. Carroll be declared and decreed to be a mortgage and that an account be taken of the amount due thereunder; that complainants be permitted to pay it, and that the instrument be cancelled of record. That in the meantime the defendants and their agents be restrained from entering upon the premises described in the alleged mortgage or in any wise interfering with the complainants' possession and use of the lands.

The bill alleged in substance that Munroe and the two Hogans were the owners of the land described in the deed, acquiring the same by purchase in January, 1882, since which time they, and since the death of Henry Hogan, his heirs, Alice Brown, Delpha Proctor and Reuben Hogan, together with Munroe and Aaron Hogan, held and maintained open and exclusive possession of the lands. That Charles T. Carroll in the year 1882, and for some years afterwards, until his death, was a merchant in the town of Monticello, and that Munroe and the Hogans traded on account with Carroll for sundry supplies and merchandise for the home and farm, and their trading extended through a period of many years, during which time periodically the Hogans and Munroe

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would pay to Mr. Carroll the money arising from the sale of the farm products; that they paid on their account cash, labor and farm produce an amount equal or nearly so to the price and value of the goods and merchandise sold to them.

That in December, 1894, Mr. Carroll claimed that the Hogans and Munroe owed him on the account the sum of \$1,218.45; that they were not satisfied that such sum was due, but relied upon the statement of Mr. Carroll, and at his request executed the written instrument mentioned as security for the payment of the debt; that he explained to them at the time that it was a trust deed or mortgage to secure the sum due on their account; that the instrument, although a deed of conveyance on its face, a fact which they did not discover until after the death of Mr. Carroll in 1903, was then and is now a mortgage to secure the payment of the debt mentioned.

That the complainants continued their trading with Mr. Carroll until his death, occupied and cultivated the land, paid taxes thereon and exercised control and ownership over it; that the amount of the debt for which the mortgage was given has been paid; that since the death of Mr. Carroll the administratrix of his estate denies that the deed is a mortgage and insists that it is an absolute conveyance of the land and was never intended as and for a security for the payment of a debt; that she refuses to come to any accounting with the complainants as to the transactions between them and Mr. Carroll; that J. A. McClellan claims to be lessee of the premises from the defendant Fannie W. Carroll and has sought by intimidation, abuse and profane and wicked language to terrorize the complainants and compel them to surrender possession of the premises to him. That he has

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forcibly taken possession of part of the premises, assaulted the complainants with deadly weapons, and maintains possession of a portion of the lands by force, intimidation and brutality.

The defendant Fannie T. Carroll answered the bill, denying the allegations of ownership of the land by the complainants, that the deed of conveyance was given as security for a debt, that she refused an accounting to them, and averred that they were now largely indebted to the estate of Mr. Carroll and had made no effort to pay the same.

There was no answer by the defendant McClellan.

Testimony was taken before a Special Examiner and the court upon final hearing dismissed the bill of complaint because the evidence failed to support its allegations. This result was reached by striking out that part of the testimony of Robert H. Munroe and Aaron Hogan relating to the transactions and communications alleged to have been conducted by them with Charles T. Carroll, who was deceased at the time of the institution of the suit, concerning the nature of the deed from Munroe and the Hogans to the said Charles T. Carroll. From this decree the complainants appealed.

There are four assignments of error, but all involve the one question of the correctness of the court's ruling in eliminating the testimony of Munroe and Hogan relating to the transactions between them and Mr. Carroll, who was at the time deceased, concerning the nature of the deed which was in form a conveyance of the land.

The language of that portion of the decree regarding the testimony of Munroe and Hogan relating to transactions and communications with Mr. Carroll during his

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life time concerning the nature of the deed is sufficiently broad to include all testimony as to business dealings with him; the purchase of supplies; the running of accounts; the payments on same, statements of accounts rendered by Mr. Carroll; payments to him of sums of money on account of taxes on the land after the date of the deed; payments in turn by Mr. Carroll to the tax collector. All testimony by Munroe and Hogan as to the transaction in December, 1894, with Mr. Carroll in which they executed the written instrument as a mortgage to secure the payment of the debt they owed; Mr. Carroll's statement to them concerning the intention of the parties and the purpose of the instrument; all testimony as to his purpose or intention in requiring them to execute the paper and the necessity or reason for it, and the amount each was to pay to obtain a release. With this testimony excluded there was no evidence sufficient to support the allegations of the bill as to the nature of the instrument which was alleged to be a mortgage other than the testimony of the witnesses Munroe and Hogan as to their purpose and intention in executing the paper which we do not deem to have been excluded or stricken by the chancellor.

Section 1505 of the General Statutes, 1906, is as follows: ("No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto; Provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party, or interested person, derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between

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such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir-at-law, next-of-kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."

The correctness of the court's ruling seems to be abundantly sustained by the decisions of this court. See *Ley and Zetrouer v. Edwards*, 21 Fla. 333; *Sanderson's Administrators v. Sanderson*, 17 Fla. 820; *Tunno and Jessup Co. v. Robert*, 16 Fla. 738; *Neal v. Gregory*, 19 Fla. 356; text 373; *Edwards v. Rives*, 35 Fla. 89, 17 South. Rep. 416; *Holiday v. McKinne*, 22 Fla. 153; *Adams v. Board of Trustees Internal Imp. Fund*, 37 Fla. 266, 20 South. Rep. 266; *Withers v. Sandlin*, 44 Fla. 253, 32 South. Rep. 829; *Patrick v. Kirkland*, 53 Fla. 768, 43 South. Rep. 969.

Solicitors for appellants contend, however, that the case at bar presents an exception to the rule prescribed by the statute quoted, and that the testimony of Munroe and Hogan which was stricken by the chancellor was admissible.

It is urged that the quoted statute was an enlargement and not a restriction of the common law rule relating to the competency of witnesses, that the statute removed the common law disability arising from interest in the event of litigation, except in those cases where one of the parties to the transaction or communication was at the

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time of the examination dead or insane, in which cases the common law disability arising from interest in the litigation is retained, and that the statute in such cases disqualifies those only who were disqualified by the general rule of the common law. In such premise the solicitors for appellants are correct. See *Adams v. Board of Trustees Internal Imp. Fund, supra*.

But did there exist at common law an exception to the rule disqualifying a witness because of interest in the event of litigation and does the stricken testimony of Munroe and Hogan fall within such common law exception to the general rule? If so, their testimony was admissible and should not have been eliminated by the chancellor in arriving at his decision as to the equities of the case.

The facts are that both Munroe and Hogan are parties to the suit and both interested in the event thereof, and that the transactions and communications concerning which they wished to testify were held with a person who at the time of the examination was deceased and that his widow, who is described in the pleadings as the "*executrix* of the estate" and sued in that capacity, is the other party to the suit against whom such testimony was offered.

There is a statute, Section 2494, General Statutes, 1906, which provides that all deeds of conveyances or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor shall be deemed and held mortgages and shall be subject to the same rules of foreclosure and to the

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same regulations, restraints and forms as are prescribed in relation to mortgages. The instrument of writing conveying the real estate involved in this case was executed, acknowledged and recorded on the same day, December 18th, 1894. The witnesses were R. E. Sloan and T. M. Puleston, the latter as County Judge took the acknowledgments of the grantors and their wives, and the certification of recordation is signed by D. S. Oakley, as Deputy Clerk of the Circuit Court. None of these were called as witnesses, nor was any reason shown for not doing so. But assuming that these witnesses knew, or any one of them knew the purpose or intention of the parties, grantors and grantee, in executing and accepting the written instrument, and such purpose was merely to secure the payment of money, but they were dead or beyond the jurisdiction of the court, or their evidence for any reason was not obtainable. Their testimony if obtainable and had been produced would have established the character of the instrument as a mortgage. And if it was a mortgage it could never be anything else. See *Connor v. Conner*, 59 Fla. 467, 52 South. Rep. 727; *Elliott v. Conner*, 63 Fla. 408, 58 South. Rep. 241.

But it is argued by solicitors for appellants, if Munroe and Hogan cannot testify to the relations that existed between them and Charles T. Carroll at the time of the execution of the instrument and to the transactions and communications between them, they will be deprived of the benefit of the statute, because the statute can have no effect or execution unless the parties interested, in a controversy involving the question of the nature of a written instrument which on its face is a conveyance of lands, are permitted to testify to those transactions and communications between them which establish its character. No other evidence can be reasonably expected

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except the testimony of the parties to the instrument who knew better than any other persons what the purpose and intention of the parties were.

It is therefore argued that the case is analogous to those cases at common law where on grounds of public policy it was deemed essential to the purposes of justice, as for instance where the law could have no force but by the evidence of the persons in interest they were permitted to testify. See 1 Greenleaf on Evidence (16th ed.), §348.

Under the common law all persons who were interested in the event of a suit were disqualified from testifying therein whether their antagonists in interest were living or dead. There were two classes of exceptions in which the parties' own oath could be received as competent testimony, according to Mr. Greenleaf in his work on evidence. To enumerate the instances which at common law were considered exceptions to the general rule and in which a party in interest was permitted to testify would be of no value, because they were not analogous to the case at bar in that where the evidence of the party in interest was received at common law the antagonist in interest was living at the time of the oath *in litem* was received. The two classes of cases in which the oath *in litem* was admitted, says Mr. Greenleaf, are first where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods and no other evidence can be had of the amount of damages. This case clearly does not fall in that class. The second class was where on grounds of *public* policy it was deemed essential to the purpose of justice. The first mentioned class of exceptions

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rested upon the just odium entertained both in equity and at law against spoliation as well as the fact that in the nature of the subject no proof could otherwise be expected. The second class of exceptions consisted of those in which *public* necessity or expediency required it. It is equally apparent that this case does not fall in that class. The case of *United States v. Murphy and Morgan*, 16 Peters (U. S.) 203, 10 L. Ed. 937, contains a clear elucidation of the principle lying at the foundation of each exception.

Counsel also contend that as the statute declaring written instruments in the form of conveyances to be mortgages when given for the purpose of securing the payment of money was enacted many years before the statute permitting persons in interest to testify was enacted, the legislative purpose was disclosed to permit the parties in interest to testify in a cause involving the question whether a certain conveyance in form was in reality a mortgage. Such purpose is not at all evident, but if it was the latter Act was a renunciation of such purpose so far as witness in interest was concerned who wished to testify as to communications and transactions with a person deceased at the time of the examination in an action against the legal representative of such deceased person.

The proviso of the Act of 1874, Section 1505, General Statutes, 1906, rests upon the ground, as some authorities express it, of the enforced silence of the other interested party to the transaction. It is not deemed fair to permit an interested party to have the benefit of testimony which might appear in a different light, or which might not be given at all if the examination of the adverse party could be secured. See *O'Brien v. Weiler*,

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140 N. Y. 281, 35 N. E. Rep. 587; McCanless v. Reynolds, 74 N. C. 301; Smith v. Moore, 142 N. C. 277, 55 S. E. Rep. 275; Shetler v. Stewart, 133 Iowa 320, 107 N. W. Rep. 310, 110 N. W. Rep. 582; McDonald v. Harris, 131 Ala. 359, 31 South. Rep. 548; Harris v. Bank of Jacksonville, 22 Fla. 501.

The court is not concerned with the wisdom of the rule. The authorities are many and strong which declare that the policy on which the rule rests is fallacious and weak. That there are more honest claims defeated by the rule which destroys the evidence to prove such claims than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. However, this may be the, the rule obtains in this State, and has been many times considered by this court and upheld.

The chancellor did not err in eliminating the testimony, so the decree is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

W. H. DOWNING, C. B. MARTIN AND J. F. TOLBERT, *Plaintiffs in Error*, v. GEO. P. MORRIS, TRUSTEE, *Defendant in Error*.

Decision Filed July 10, 1920.

Writ of Error to a Judgment of the Circuit Court Within and for the County of Columbia; M. F. Horne, Judge.

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J. B. Hodges, for Plaintiffs in Error;

R. T. Boozer and W. H. Boozer, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

JOHN HAMLIN, *Plaintiff in Error*, v. **THE STATE OF FLORIDA**, *Defendant in Error*.

Opinion Filed July 10, 1920.

1. Although there may be conflicts in the evidence, if there is sufficient competent evidence of all the facts legally essential to support a verdict of conviction and there is nothing in the record to indicate that the jury was influenced by any consideration outside the evidence in arriving at the verdict returned, the judgment will not be disturbed by an appellate court on the ground of the insufficiency of the evidence to support the verdict.
2. Evidence examined and found sufficient to support a verdict of conviction.

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A Writ of Error to the Circuit Court for Wakulla County; E. C. Love, Judge.

Judgment affirmed.

W. C. Hodges and *Greene S. Johnston*, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WEST, J.—Plaintiff in error, referred to herein as defendant, was found guilty upon a charge of the larceny of hogs of the value of more than twenty dollars. His motion for a new trial was denied. From the judgment imposing sentence of imprisonment upon him writ of error was taken.

The assignment of error presents for our consideration only the question of the sufficiency of the evidence to support the verdict. To set out the evidence *in extenso* would be of no benefit.

According to the State's theory, the hogs alleged to have been stolen by defendant were running at large in Wakulla County near the home of the alleged owner and were in his mark. They disappeared and were found in Jefferson County about two months later in the possession of a third party, to whom they had been delivered by defendant on agreement that they would be fattened "on halves." They were hauled by defendant in the night time to the place where they were delivered in Jefferson County.

A witness on behalf of the State testified that he saw defendant with three hogs "tied down" in the woods in

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Wakulla County; that when defendant and another who was with him, and who was also indicted, but acquitted at the trial, left the hogs and went away to get a wagon to haul them, this witness went up and looked at the hogs and saw that they were in the mark of the alleged owner.

There is also evidence to the effect that defendant offered to pay a witness to testify in his behalf at the trial

The person jointly indicted with defendant and acquitted at the trial denied that he and defendant were in possession of the hogs in the woods in Wakulla County, and denied that he had anything to do with the alleged theft of the hogs or that he knew anything about it.

The defendant testified that the alleged owner of the hogs was indebted to him and delivered the hogs to him in settlement of the indebtedness; that the hogs were accepted by him for an agreed price, which was ten dollars more than the account; that the account was marked paid and ten dollars in cash was paid to the alleged owner; that the hogs after being delivered were openly held by him in a pasture for about thirty days and were then delivered to the party in Jefferson County to be fattened and were hauled through to Jefferson County in the night time because of excessive heat; that later the alleged owner wanted to trade back for the hogs, but defendant declined to do so, and told him that he had "shared them out" to be fattened to the party in Jefferson County whose name was given, and that he was the one who told the alleged owner where the hogs were; that he did not steal the hogs, but bought and paid for them, and after taking possession of them made no effort to conceal them.

The alleged owner denied that he sold the hogs to defendant and denied that defendant told him where the

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hogs were or that he had any conversation with him about them.

The venue as alleged was proved and the venue and date of the alleged larceny were proved.

The record presented simply a question of fact for the jury to determine. There are conflicts in the evidence, but the jury accepted the theory of the State and found defendant guilty as charged, and this verdict has the sanction of the trial judge, who denied the motion for a new trial. There is nothing whatever in the record to suggest that the jury was influenced by anything outside the testimony in arriving at the verdict returned. There is sufficient competent evidence of all the facts legally essential to support the verdict, and under the well-settled rule in such cases this court is not authorized to disturb it. *Wallace v. State*, 76 Fla. 175, 79 South. Rep. 634; *Messer v. State*, 75 Fla. 619, 78 South. Rep. 680; *McCoy v. State*, 75 Fla. 294, 78 South. Rep. 168; *Herndon v. State*, 73 Fla. 451, 74 South. Rep. 511; *Barrentine v. State*, 72 Fla. 1, 72 South. Rep. 280; *McClellan v. State*, 66 Fla. 215, 63 South. Rep. 419.

The judgment will be affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Strickland et al. v. Jewell—Syllabus.

A. MILDRED STRICKLAND AND JAMES S. STRICKLAND, *Appellants*, v. B. W. JEWELL, *Appellee*.

Opinion Filed July 10, 1920.

1. Although the oath of defendants to the answer is expressly waived in the bill, defendants are not excused from signing the answer, without which it is not their answer, and in such case where the answer is signed only by the solicitor for defendants, it may be treated as no answer and a decree *pro confesso* entered.
2. Before a decree *pro confesso*, which has been properly entered, should be set aside on motion of defendants, they must not only show reasonable diligence, but also a meritorious defense.
3. The question of setting aside a decree *pro confesso* is addressed to the sound discretion of the court, which will be exercised according to the circumstances of each case, but it should never be set aside when it is in consequence of defendants' own negligence, and the exercise of this discretion will not be interfered with by the appellate court unless there has been a gross abuse of that discretion.
4. Where a husband signs a promissory note with his wife to aid her in obtaining a loan of money and also unites with her in the execution of a mortgage on her real property to secure the payment of the note the husband is personally liable on the note even though the wife is not so liable.
5. The maker of a promissory note for which there was a consideration will not be permitted to vary or contradict his written contract by showing a parol contemporaneous agreement that he was not to be liable upon the note.

An Appeal from the Circuit Court for Duval County;
Daniel A. Simmons, Judge.

Decree affirmed.

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H. L. Anderson, for Appellants;

Fleming & Fleming, for Appellee.

JONES, Circuit Judge.—This was a suit to foreclose a mortgage in the Circuit Court of Duval County. A demurrer to the bill was overruled August 19th, and an order made requiring defendants to plead or answer on or before the following 15th of September. On September 9th, answer was filed signed only by solicitor for defendants. On September 23rd upon motion of complainant the court, treating the putative answer as a nullity, entered a decree *pro confesso* and referred the case to a special master to take and report the testimony. On September 24th motion was filed to set aside the decree *pro confesso* and for leave to amend the answer by adding thereto the signatures of the defendants on the grounds that it was not possible on account of absence to procure the signatures of defendants to the answer on or before the date fixed by the court for filing same, and that the decree *pro confesso* was entered without notice to the defendants. On September 30th the motion to set aside the decree *pro confesso*, supported by an affidavit of defendants' solicitor and an affidavit of defendant, J. S. Strickland, was heard and denied and final decree entered. Defendants appeal and assign as errors the entry of the decree *pro confesso*, the order denying the motion, and from all other orders since the entry of decree *pro confesso*.

Although the oath of defendants to the answer is expressly waived in the bill, defendants are not excused from signing the answer, without which, it is not their answer, and in such case where the answer is signed only by the solicitor for defendants it may be treated as no answer and a decree *pro confesso* entered. See *City of*

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Ocala v. Anderson, 58 Fla. 415, 50 South. Rep. 572, and authorities there cited.

The decree *pro confesso* was properly entered, and before it should be set aside on motion of defendants they must not only show reasonable diligence, but also a meritorious defense. A showing of reasonable diligence without a meritorious defense, or a meritorious defense without reasonable diligence, is unavailing. See Keil v. West, 21 Fla. 508; Myers v. McGahagan, 26 Fla. 303, 8 South. Rep. 447; Turner v. Jones, 67 Fla. 121, 64 South. Rep. 502; Prout v. Dade County Security Co., 55 Fla. 816, 47 South. Rep. 12; Friedman v. Rehm, 43 Fla. 330, 31 South. Rep. 234.

In the affidavit of the solicitor for defendants he deposes "that affiant at the time the answer of defendants was filed herein on the 9th day of September, 1918, was preparing to leave the State of Florida to be absent for a period of about two weeks; that affiant in fact left the State of Florida before the 16th day of September, 1918, the date at which defendants were required by order of the court to file their said answer; that affiant was absent from the State of Florida until the 24th day of September, 1918, and that the absence of the defendants and the fact that affiant was compelled to be out of the State of Florida as above stated accounts for the failure of defendants to sign the answer." The affidavit of defendant, J. S. Strickland, recites "that the defendants were absent from Duval County, Florida, at the time, affiant is informed, that the answer in this case was prepared by counsel for defendants, and defendants were for this reason unable to sign the answer filed by their counsel in this cause. Affiant further says that he is informed and so states that the answer in this cause was filed by

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affiant's counsel in advance of the time fixed for filing same because affiant's said counsel was preparing to leave the State of Florida, and in fact said counsel for defendants did leave the State of Florida prior to the 16th of September, 1918. Affiant further says that the absence of defendants and the fact that defendants' counsel was compelled to leave the State of Florida is the reason why said answer was not signed by defendants. Affiant further says that the defendants are ready and willing to sign the answer which was filed by their said counsel if permitted by the court to do so. Affiant further says that neither affiant nor his said counsel has been guilty of any negligence in the matter of filing said answer or in the omission to sign same, but that in the circumstances above set forth it was impossible for defendants to sign said answer before the same was filed."

The affidavits are quoted at length because it is assumed that they set forth all the facts and circumstances favorable to the defendants tending to show reasonable diligence, such as to excuse them for failure to put in a proper answer and to give them the right to have the decree *pro confesso* set aside and to permit them to sign the proposed answer.

The defendants were given from the 19th day of August to and including the 15th day of September to file an answer. The only excuse offered by the solicitor for his failure to have the defendants sign the answer is that he was preparing to leave the State to be absent about two weeks, and in fact did leave the State before the last day fixed by the order of the court upon which the answer could be filed, and that the absence of defendants and himself accounts for the failure of defendants to sign the answer. It is not shown why he absented himself

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from the State, nor that it was necessary for him to leave, nor the date of his departure, except that it was prior to the date fixed for filing the answer, nor that he ever made any effort to have defendants sign it, nor that he could not have procured their signatures to the answer if he had endeavored to do so. He avers that defendants were absent, but does not show when they were absent, nor whether they were beyond the limits of the State or the Country, nor why he could not have communicated with them. J. S. Strickland deposes that defendants were absent from Duval County at the time, he is informed, that the answer was prepared, therefore they were unable to sign it. No reason is stated for their absence, nor is it disclosed where they were, nor why they and their solicitor could not have conferred together or communicated with each other regarding the preparation and filing their answer, nor when their absence commenced or when it terminated, but that it merely existed at the time the answer was prepared. It is not shown there was any desire or intention on the part of defendants to sign the answer.

The question of setting aside a decree *pro confesso* is addressed to the sound discretion of the court, which will be exercised according to the circumstances of each case, but it should never be set aside where it is the consequence of the defendants' own negligence, and the exercise of this discretion will not be interfered with by the appellate court unless there has been a gross abuse of that discretion. Prout v. Dade County Security Co., *supra*.

The affidavits submitted as proof of reasonable diligence and to excuse defendants for failure to file an answer are insufficient. The complainant should not be deprived of his rights under the decree upon such flimsy

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and unsatisfactory excuses. There was no error in denying motion to set aside the decree *pro confesso*.

This opinion could be with propriety closed at this point without referring to the proposed answer, but it may be well to consider the main question presented by this proposed answer, because it is the contention of appellants that it is a good and meritorious defense for J. S. Strickland, and as the motion to set aside the decree *pro confesso* was filed so promptly, the next day after the entry of the decree *pro confesso*, it should have been granted.

This was an ordinary bill of foreclosure against the defendants as husband and wife. The bill alleges that defendants being indebted to the complainant, executed and delivered to him their promissory note and mortgage on real estate the property of the wife to secure the payment of the note. The proposed answer denied that J. S. Strickland was at any time indebted to the complainant; it is alleged that the indebtedness evidenced by the note was for money loaned by complainant to A. Mildred Strickland and not to J. S. Strickland, and that the latter had no interest whatsoever in the premises covered by the mortgage; that the wife was the owner of and was in possession of the property and that she borrowed the money for which the note and mortgage were given to be used in paying off a mortgage on this same property. It is admitted that defendants executed the note and mortgage and there is no contention that the note or any part of it had been paid, but it is alleged that J. S. Strickland executed the note and mortgage because complainant through his agent represented to him that in order to effect the loan to Mildred Strickland that it was necessary for him to sign the note and mortgage with her, but that

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he would not be required to repay the loan and that he would assume no obligation of any kind or nature by signing said note and mortgage, and that complainant would never demand of him payment of the note or any part of it, or any costs of suit to enforce the payment of said note, and that he relied upon said promises and representations and would not have signed the note and mortgage upon any other conditions, and defendants plead the foregoing facts as a defense to the bill and as a basis for affirmative relief, and pray for a decree releasing and acquitting J. S. Strickland of all liability on the note and mortgage.

J. S. Strickland admits that he was told by the agent of complainant that unless he signed the note and mortgage with his wife she could not procure the loan she was in need of, and that in order to assist her in acquiring this money he did join with her in the execution of the note and mortgage.

Where a husband signs a promissory note with his wife to aid her in obtaining a loan of money and also unites with her in the execution of a mortgage on real property, the title to which is in the wife, to secure the payment of the note, the husband is personally liable on the note even though the wife is not so liable. *Mattair v. Card*, 18 Fla. 761.

The note in question being the note of J. S. Strickland a plea or answer setting up representations by the payee to the maker that by signing it the maker would assume no obligation of any kind and that he would never be required to pay it, constitutes no defense at law or in equity in an action to enforce payment of the note. The rule is that the maker of the note for which there was a consideration will not be permitted to contradict or vary his

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written contract by showing a parol contemporaneous agreement that he was not to be liable upon the note. *Bacon v. Green*, 36 Fla. 325, 18 South. Rep. 870.

It was said in *Wright v. Remington*, 12 Vroom (N. J. Law) 48, 32 Am. Rep. 180, text 184: "The weight of authority is overwhelming in favor of holding in the language of the American Editors of the *Duchess of Kingston's* case that 'a person who is so ill-advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced must submit to the loss if he is deceived and can not ask that a principle of great amount to the community shall be made to yield for the sake of relieving him from the consequences of his indiscretion.'"

The mortgage contains covenants that in the event mortgagors fail to pay taxes on the property and to keep the building insured, which they obligated to do, the mortgagee shall have the right to pay the same and to insure the building. The bill alleges that complainant is entitled to recover specified sums of money because of a breach of these covenants, also certain amounts for costs, expenses and attorney fees in the foreclosure proceedings, all of which are provided for in the mortgage. The proposed defense is a bare denial that complainant is entitled to recover amounts claimed without alleging any affirmative matter of defense. The master took testimony touching the items claimed just as if an answer had been on file and the proof amply sustains the allegations of the bill.

There being no error the final decree should be affirmed.

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PER CURIAM.—The record in this cause having been considered by the Court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the Court that the decree herein be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

WEST 132 FEET OF SOUTH HALF OF SOUTHEAST QUARTER OF SOUTHWEST QUARTER OF SOUTHWEST QUARTER OF SECTION TWENTY-SIX, TOWNSHIP TWENTY-TWO, SOUTH OF RANGE TWENTY-NINE EAST, VIRGINIA BURNS AND JOHN JONES, *Appellants*, v. THE CITY OF ORLANDO, A MUNICIPAL CORPORATION, AND JOHN D. RAMKE, *Appellees*.

Opinion Filed March 27, 1920.

Petition for Rehearing Granted May 3, 1920.

Opinion on Rehearing Filed July 10, 1920.

1. Nothing can be received as a defense to an application for a writ of assistance to affect the decree in aid of which the writ is asked, but the jurisdiction of the court in the original cause is open to question.
2. Where constructive service by publication is substituted by statute for personal citation, a strict compliance with the statutory provisions is essential to confer jurisdiction.

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3. Where the law authorizes described land to be made defendant in a suit for enforcing a lien thereon, there should be no material variance between the land described in the pleadings and that described in the notice by publication, and where the description in the notice as published is ambiguous and may describe two distinct bodies of land, such description is too indefinite to constitute a valid notice by publication.

Decree reversed.

Jones & Jones, for Appellants;

Massey & Warlow, for Appellees.

REAVES, Circuit Judge.—The City of Orlando is empowered by Chapter 5317, Acts of 1903, as amended by Chapter 5524, Acts of 1905, to collect unpaid taxes by foreclosure of the lien and sale of the property assessed. The proceeding shall be brought against the person named as owner and others, if any, interested in the property, and "If such real estate be assessed to an unknown owner, the city solicitor may bring the bill against the real estate itself as defendant." Sec. 13 as amended.

Resident defendants must be served personally, and absent defendants may be served by publication. The notice published "shall be addressed 'to all whom it may concern,'" and "shall contain a description of the real estate," and "if the real estate itself be made the defendant, the service shall be made by the making and publication of the order 'To all whom it may concern' herein provided," etc. Sec. 13.

The bill was brought against the property; it having been assessed as "unknown," no owner or other person

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interested being named as a defendant. Final decree followed a decree *pro confesso*; the property was sold and deeded by the master to John D. Ramke, one not a party to the suit, who, after a lapse of more than two years petitioned the court for a writ of assistance to secure possession of a portion of the property then held by John Jones and Virginia Burns, and from an order granting such writ defendants named in the petition appealed.

"Nothing can be received as a defense to an application for a writ of assistance to affect the decree in aid of which the writ is asked, defendant * * * being concluded on the merits." 5 C. J. 1322; Knight v. Hodge, 62 Fla. 516, 56 South, Rep. 942; Keil v. West, 21 Fla. 508.

"However the jurisdiction of the court in the original cause is open to question on an application for writ of assistance to enforce the decree therein." 5 C. J. 1323 and authorities cited in Note 85.

Many questions are raised and argued in the briefs, but at the very threshold of our investigation we are confronted by what seems to be a fatal defect in the citation as published which vitiates all subsequent proceedings.

The defendant named in the bill is the West 132 ft. of the S $\frac{1}{2}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 26. Tp. 22 S., R. 29 E., but in the citation or order of publication as published the description is "The West 132 feet of South half of Southeast quarter of Southwest quarter Southwest quarter of Section 26, Township 22 South, Range 29 East."

It will be noted that the word "of" preceding the words "Southwest quarter" last written is omitted. Of is a

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small word, but in describing lands it has large significance, and its omission in this case leaves such uncertainty as to the particular land proceeded against as not to afford reasonable notice to parties interested therein.

Where constructive service by publication is substituted by statute for personal citation, a strict compliance with the statutory provisions is essential to confer jurisdiction. *Shrader v. Shrader*, 36 Fla. 502, 18 South. Rep. 672; *Myakka Co. v. Edwards*, 68 Fla. 382, 67 South. Rep. 217.

Where the law authorizes described land to be made a defendant in enforcing the lien thereon, there should be no material variance between the land described in the pleadings and that described in the notice by publication. And where the description of the land in the notice by publication is ambiguous and may describe two different distinct bodies of land, the description is too indefinite to constitute a valid notice by publication.

Though not directly in point, the following cases are enlightening upon the general proposition of what constitutes a sufficient description of real estate to afford constructive notice in a proceeding *in rem* to collect taxes by sale of the land: *Lee v. Crawford*, 10 N. D. 482, 88 N. W. Rep. 97; *Keith v. Hayden*, 26 Minn. 212, 2 N. W. Rep. 495; *Power v. Bowdie*, 3 N. D. 107, 54 N. W. Rep. 404.

To one familiar with the description of lands, it would be apparent that some mistake existed in the published order, but whether it was the omission of the preposition of, or the conjunction and, or of a mere comma, or an accidental repetition, he could only guess; but whether of, or, and should be supplied or words "Southwest quarter" last occurring omitted, would make a vast differ-

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ence in the location and area of the land involved. To one not so accustomed to description of lands, it would be apparent that the description did not correspond with this deed, and therefore in neither case would the notice be reasonably calculated to bring the proceedings to the knowledge of parties who might use ordinary diligence in looking after their interest in the land involved.

The order appealed from should be reversed.

PER CURIAM.—The record in this cause having been considered by this Court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the Court as its opinion, it is considered, ordered and adjudged by the Court that the decree herein be, and the same is hereby, reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

WEST 132 FEET OF SOUTH HALF OF SOUTHEAST QUARTER OF SOUTHWEST QUARTER OF SOUTHWEST QUARTER OF SECTION TWENTY-SIX, TOWNSHIP TWENTY-TWO, SOUTH OF RANGE TWENTY-NINE EAST, VIRGINIA BURNS AND JOHN JONES, *Appellants*, v. THE CITY OF ORLANDO, A MUNICIPAL CORPORATION, AND JOHN D. RAMKE, *Appellees*.

On Rehearing.

1. An uncertain description of property in the caption of a citation in a proceeding in rem may be aided and the notice made sufficient by a correct description in the body of the citation, since reasonable diligence would require the reading of the entire notice.

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2. Where a petition for writ of assistance shows a *prima facie* right in petitioner, it becomes the duty of a defendant in his answer, to set up his rights and claims fully and in such manner that his defense may be understood by the petitioner and by the court.
3. If an answer to a petition for writ of assistance sets up a defense, and the petitioner fails to reply thereto, proper practice requires the court to take as true the facts stated in the answer, but if the answer shows no right on the part of the occupant to contest the petitioner's claim of right to possession, the court may ignore the answer and award the writ.
4. The purchaser of property at a public sale under a foreclosure decree filed his petition for writ of assistance against parties who were strangers to the foreclosure proceedings and who by their answer failed to show that they had any interest in the property except that of bare possession and failed to show when such possession began, but who assumed to defend on behalf of others as alleged owners: *Held*, That where the court in the foreclosure proceeding appeared on the face of the record to have had jurisdiction, the regularity of such proceeding could not be put in issue by such persons in resisting the application for a writ of assistance.
5. Courts are bound to take notice of the limits of their authority, and if want of jurisdiction appears at any stage of the proceeding, original or appellate, the court should notice the defect and enter an appropriate order, but where the jurisdictional steps prescribed by statute in a proceeding in view appear on the face of the record to have been regularly taken, the court has no power to look behind the record into alleged extrinsic facts tending to impeach the jurisdiction, at the instance of one who shows no title or interest in the property other than bare possession, and who seeks to raise such question on behalf of others.

Judgment affirmed. .

Jones & Jones, for Appellants;

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Mussey & Warlow, for Appellees.

REAVES, Circuit Judge.—Upon petition for rehearing it was suggested that the description of the property named as defendant, while appearing in the caption or style of the cause, in the citation as published, as indicated in our former opinion, the property is correctly described in the body of the citation. Upon examination we found this to be true, and a rehearing was granted and counsel for the respective parties given time to file briefs upon the question of jurisdiction. The citation or notice, as published is as follows:

“Bill in Chancery to Enforce Tax Lien.

City of Orlando,

vs.

The west 132 feet of south half of
southeast quarter of southwest
quarter, southwest quarter of Sec-
tion 26, Township 22 South, Range
29 East.

To All Whom It May Concern:

Upon application to the City Solicitor it is hereby ordered that on or before the October rule day next, being October 4, A. D. 1915, in said court, you appear to and answer the bill filed and set forth in the nature of your respective interests, in, rights to, or liens upon real estate situate in the City of Orlando, and described as in the bill as the west 132 feet of the south half of southeast quarter of southwest quarter of southwest quarter of Section 26, Township 22 South, Range 29 East. It is further ordered that this order be published in the South Florida

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Sentinel, a newspaper published in said city, once a week for four successive weeks prior to said rule day.

Witness my hand and seal of said Circuit Court this 1st day of September, A. D. 1915.

B. M. ROBINSON,
Clerk Circuit Court, Orange County.
By M. A. HOWARD,
Deputy Clerk."

The statute providing the terms, and period of publication, of the order in such cases, is as follows (pp. 311-312, Acts 1905) :

"Upon application of the City Solicitor, the Clerk of the Circuit Court shall make an order of publication of notice to all persons having any interest, or right, whether as owners, lien-holders or otherwise in such real estate, which notice shall be addressed 'To All Whom It May Concern,' requiring them on or before a rule day to be fixed by such order to appear to and answer such bill and set forth the nature of their respective interests in, rights to and liens upon the said real estate; which order shall be entitled with the names of the parties named in the bill and shall contain a description of the real estate and shall be published in a newspaper published in the city once a week for any four consecutive weeks prior to the sale" (evidently meant *rule*) "day fixed in such order, and in all suits in which such order and publication shall be made the interests, rights, and liens of all persons in, to and upon such real estate, whether such persons be named as defendants in the bill or not, shall be foreclosed and their respective interests, rights and liens shall by the proceedings be affected thereby to the same extent as though they were named and duly served and had appeared as parties defendant in such suit."

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There being no party named as defendant, except the land proceeded against, the attempt was undoubtedly made to describe the land in the caption of the citation and then again in the body of the citation. Speaking of the description used in the caption, we held that it was so uncertain as not to be reasonably calculated to bring the proceedings to the knowledge of parties who might use ordinary diligence in looking after their interest in the land involved. But inasmuch as the correct description is given in the body of the citation, which fact escaped our notice when the previous opinion was written, we believe that reasonable diligence would require the reading of the entire notice and that one interested in the property could not, and would not, if confused by the uncertainty of the description in the caption fail to be advised by the correct description in the body of the citation. We are, therefore, unable to say that the citation was not sufficient and that the court did not acquire jurisdiction. Because the description in the caption of the citation is more conspicuous and affords a much more ready reference than that in the body, and a similar omission of the preposition "of" occurring in the notice of sale, was very prominently stressed in the briefs, it was easy to overlook the fact that the citation contained a repetition of the description in correct form.

Turning now to the multitude of assignments of error, thirty-five in all, we are confronted with what seems to be an insuperable obstacle to the consideration of any of them. It does not appear that the parties against whom the writ of assistance was issued; namely, Virginia Burns and John Jones, have any interest whatever in the property involved. The petition says that these parties are in possession of the property and their answer admits

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such possession, but when the possession was acquired, under whom it is held, whether as trespassers or of right and what the nature of that right is, if any, the answer is wholly silent. The answer is very lengthy and attacks the foreclosure proceeding from many angles, but it nowhere shows any such right or interest in the said Virginia Burns and John Jones, or either of them, as will enable the court to pass upon the questions attempted to be raised. These parties are certainly strangers to the record in foreclosure. They show no interest in the property now except that of mere possession and they fail to show when such possession began. That they cannot under such circumstances question the validity of the decree seems evident on principle and is settled by the authorities. *Smith v. Elliott*, 56 Fla. 849, 47 South. Rep. 387; 23 Cyc. 1068; *Harpold v. Doyle*, 16 Idaho 671, 102 Pac. Rep. 158.

The petition shows a *prima facie* right of possession and it was the duty of the defendants, in their answer, to set up their rights and claims fully and in such manner that their defense, if they had any, might be understood by the petitioner and by the court. *Gorton v. Paine*, 18 Fla. 117.

And if the answer had set up a defense and the petitioner had failed to reply thereto, proper practice would have required the court to have taken as true the facts set up in the answer. 2 R. C. L., p. 739, Sec. 13; Ann. Cas. 1913D, Note Page 1128, citing *Thomas v. DeBeaum*, 14 N. J. Equity, 37.

No replication was filed in this case, but inasmuch as the answer failed to show any right on the part of the occupants against whom the petition was directed to contest the purchaser's title and claim of possession, the

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chancellor was justified in ignoring the answer as he did and in awarding writ of possession. The apparent purpose of the answer is to defend the possession on behalf of other parties; namely, Frank D. Cook, George L. Cook and Catherine Turner, whom it is alleged own separate parts of the property in question and have separate suits in chancery pending against the petitioner, J. D. Ramke, seeking to set aside the master's deed, and the answer alleges that the said property consisted of three ownerships of separate parcels at the time of the foreclosure and that a portion of the property had been assessed in the name of Catherine Turner for some of the years for which the liens for taxes were foreclosed, and, therefore, that the city had no power to proceed against the property as unknown. It is obvious that these allegations suggest very serious legal questions, which should be determined in the proper way and at the instance of the proper parties.

It may be that due process of law was not observed and that jurisdiction was not acquired.

Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order. *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462, 4 Sup. Ct. Rep. 510. 15 C. J. p. 852, Sec. 171.

But where the jurisdictional steps prescribed by statute in a proceeding *in rem* appear on the face of the record to have been regularly taken, the court has no power to look behind the record into alleged extrinsic facts tending to impeach the jurisdiction, at the instance of one who shows no title or interest in the property other than bare

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possession, and who seeks to raise such questions in behalf of others.

It is not apparent that the order of the Chancellor appealed from could prejudice the rights of the real parties in interest, or any of them, to have the questions suggested by this record, or any other available questions adjudicated in a proper action, but in abundant caution, under the circumstances, the order appealed from should be affirmed expressly without prejudice.

PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the court that the judgment herein be, and the same is hereby, affirmed, without prejudice.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

SAMUEL HABERSHAM, *Plaintiff in Error* v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed July 10, 1920.

1. Whatever may be the rule for alleging the common law crime of burglary, an information alleging the offense substantially as defined by the statute, is sufficient where the nature and cause of the accusation as made could not reasonably mislead or embarrass the accused in concerting his defense.
2. Where there is ample evidence to sustain a conviction and no material or harmful errors of law or procedure appear, the judgment will be affirmed.

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A Writ of Error to the Criminal Court of Record for Dade County; J. Emmet Wolfe, Judge.

Judgment affirmed.

Gautier & Riley, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WHITFIELD. J.—The information herein alleges “that Samuel Habersham, laborer, late of the County of Dade and State of Florida, on the 20th day of December, in the year of our Lord one thousand nine hundred and nineteen, in the county and State aforesaid, did then and there break and enter a certain dwelling house, to-wit, the dwelling house of one John Frohock, situated in Miami, Dade County, Florida, and known and designated as 329 Eighth Street, a more particular description of which said dwelling house being to the County Solicitor unknown, with intent then and there to commit a felony, to-wit, with intent then and there to take, steal, and carry away money, goods, and chattels therein being of the value of more than Twenty Dollars (\$20.00), of the money, goods, and chattels of the said John Frohock, a more particular description of which said money, goods and chattels being to the County Solicitor unknown, the said Samuel Habersham being then and there armed with a dangerous weapon, to-wit, an automatic revolver, a more particular description of which said revolver being to the County Solicitor unknown, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.”

The statute defining the offense is as follows:

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“Whoever breaks and enters a dwelling house, or any building or structure within the curtilage of a dwelling house though not forming a part thereof, with intent to commit a felony, or after having entered with such intent breaks such dwelling house or other building or structure aforesaid, if he be armed with a dangerous weapon, or have with him any nitro-glycerine, dynamite, gunpowder or other high explosive at the time of breaking and entering, or if he arm himself with a dangerous weapon, or take into his possession any such high explosive within such building, or if he make an assault upon any person lawfully therein, shall be punished by imprisonment in the State prison for life, or for such term of years as may be determined by the court.

“If the offender be not armed, nor arm himself with a dangerous weapon as aforesaid, nor have with him nor take into his possession any high explosive as aforesaid, nor make an assault upon any person lawfully in said building, he shall be punished by imprisonment in the State prison not exceeding twenty years.” §3281 Gen. Stats. 1906. On writ of error taken to a judgment under this statute, it argued that the information should have been quashed on the motion made, because the breaking and entering is not alleged to have been done “either unlawfully, feloniously or burglariously.”

Whatever may be the rule for alleging the common law crime of burglary, the prosecution here is under the statute and as the information substantially alleges the offense defined by the statute, the use of other words was unnecessary when the allegations clearly state the nature and cause of the accusation and could not reasonably mislead or embarrass the accused in concerting his defense. The allegation that the defendant was

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“armed with a dangerous weapon, to-wit, an automatic revolver,” is sufficient, as the dangerous character of the weapon may be shown under the allegation.

There is ample evidence to sustain the conviction of the statutory offense charged and no material or harmful errors of law or procedure appear.

Affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

MRS. ANNIE MAY PRATT AND JOHN H. PRATT, HER HUSBAND, *Appellants*, v. JESSE V. CARNS, JOHN N. CARNS AND WILLIAM H. O. CARNS, *Appellees*.

Opinion Filed July 10, 1920.

1. A party seeking to have a deed declared to be void and delivered up to be cancelled on the ground of undue influence exerted over the mind of the grantor must plead the facts constituting such undue influence, the rule of pleading in such cases being the same as in cases of fraud.
2. The term “undue influence” is not regarded as being susceptible of precise definition, but in order to render a deed void the undue influence relied upon must be of such a character as to overcome the will, deprive the grantor of free agency, and substitute the will of another for that of the grantor.
3. Where a bill contains allegations that deeds of conveyance were made without consideration, that the grantor and grantee were parent and child, and that undue influence was exerted over the grantor in the execution of the deeds, such

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allegations of ultimate facts or conclusions not being negatived by other specific facts alleged, a demurrer thereto may be properly overruled since, on the admission of the demurrer, it does not appear as a matter of law that undue influence was not used, and under such allegations a case entitling the complainant to relief may be made by appropriate and sufficient proof showing that in effect the grantee's will was substituted for that of the grantor in the execution of the deeds.

1. Delivery of a deed is essential to the passing of the title to the property intended to be conveyed to the grantee.
5. The placing of a deed in the hands of a third person for future delivery to the grantee may constitute a delivery, but to accomplish this purpose it must be made to appear that in placing the deed in the hands of such third person the grantor intended to, and, in fact, did relinquish and surrender all dominion and control over such deed.
6. Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled.

An Appeal from the Circuit Court for Duval County;
Daniel A. Simmons, Judge.

Order affirmed in part; reversed in part.

Fred B. Noble and *J. A. Yates*, for Appellants;

John L. Doggett and *Henry C. Clark*, for Appellees.

WEST, J.—By this suit appellees seek to have certain deeds declared to be void and of no effect and delivered up to be cancelled.

The grounds of the alleged invalidity of such deeds are the undue influence of the grantee charged to have been exerted over the mind of the grantor at the time of their execution, and as to one of the deeds it is alleged that no delivery thereof was ever made to the grantee. The grantee is the daughter of the grantor and after his death this suit was brought by the complainants, who are sons and heirs of the grantor, against the grantee, her husband and two other persons who are alleged to be tenants occupying and claiming some interest in the two pieces of property covered by such deeds respectively.

There was a general demurrer to the bill and special demurrers were interposed to the fifth and seventh, ninth and tenth and eleventh paragraphs. There was an order sustaining the demurrer as to the eleventh paragraph and overruling it as to the remainder of the bill. Both complainants and defendants entered an appeal from such order to this court. The grounds of the demurrer to the fifth and seventh paragraphs are, in substance, (1) that no facts are shown which exhibited any undue influence by the grantee over the mind of the grantor; (2) that it does not appear that said grantor was deprived of his free agency; (3) nor that the execution of the deeds described therein was against his wish or desire; (4) nor that the will of the said grantee was substituted for the will of the grantor. The grounds of the demurrer to the ninth and tenth paragraphs are the same as the grounds of the demurrer to the fifth and seventh paragraphs. The grounds of the demurrer to the eleventh paragraph are, in substance, (1) that it appears that the deeds described therein were delivered to a third person without any reservation on the part of the said grantor to retain control of such deeds; (2) that it does not appear how the said deeds were subject to the direction

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and control of the said grantor; (3) that it does not appear that a good and valid delivery of the said deeds was made to the grantee.

There is a prayer that the deeds described be declared to be void and of no effect and delivered up to be cancelled, for an injunction against any incumbrance or sale of the property, a receiver to take charge of such property, an accounting and for general relief.

The allegations of undue influence are contained in the fifth and seventh and ninth and tenth paragraphs of the bill. These paragraphs are as follows:

"5. That said John N. Carns, Sr., was naturally a kind, comforting, thoughtful and affectionate husband and father; that he continued to be such kind, comforting, thoughtful and affectionate husband and father up to a period some eight years prior to his death, when the defendant, Mrs. Annie May Pratt, who was then unmarried and known as Annie May Carns, succeeded in instilling counter influences in the life and mind of her said father by falsely persuading her father that his wife, the mother of the said defendant, Mrs. Annie May Pratt, and of your orators, was of unsound mind and was unreasonable and over-exacting in asking for care, comfort and support, and that your orators, the brothers of said defendant, Mrs. Annie May Pratt, were not worthy of the confidences of, or even of association with, or of communication to or from their said father, and your orators further show unto your Honor that said defendant Mrs. Annie May Pratt continuously endeavored, by such false persuasions and representations aforesaid, to influence her said father and the father of your orators against his wife and sons, and that said defendant, Mrs. Annie May Pratt, continuously endeavored to assume

control of her said father and of his affairs, with the purpose and intention of securing for herself so much of the property belonging to her said mother and her said father as possible, that by the means and methods aforesaid said defendant, Mrs. Annie May Pratt, succeeded in turning her father's mind against his wife and sons, and succeeded in gaining great and undue influence over her said father, and, by such false persuasions and representations as aforesaid, totally changed her said father from a kind, comforting, thoughtful and affectionate husband and father, to a disagreeable, morose, miserly, selfish husband, and succeeded in destroying all confidence, association and communication of her father in and with your orators, that, having gained such undue influence over her said father aforesaid, and having turned her said father against his wife, and against your orators, said defendant, Mrs. Annie May Pratt, further exerted her said undue influence over her father by persuading him to execute to herself the said paper, writing or purported deed above referred to, copy of which is hereto attached and marked 'Exhibit A,' and said defendant, Mrs. Annie May Pratt, and her said father, did exercise such persuasion and undue influence over the wife of the father of said defendant, that his wife was thereby compelled to join in the execution of said deed."

"7. That by reason of the fact that said purported deed, copy of which is hereto attached, marked 'Exhibit A,' was obtained by undue influence as aforesaid, the same is null and void, and of no effect, and these complainants are entitled to receive and have the same set aside, delivered up and cancelled."

"9. That said last mentioned deed, copy of which is hereto attached and marked 'Exhibit B,' was executed

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by the said John N. Carns, Sr., under and by reason of the continued false persuasions and representations made by the said defendant, Mrs. Annie May Pratt, to her father, as set out more fully in paragraph 5 of this bill of complaint; that there was no consideration passing from the defendant to the said John N. Carns, Sr., for the execution of said purported deed, copy of which is hereto attached and marked 'Exhibit B,' and that whatever consideration appears in said purported deed was merely nominal, and that there was no consideration for its execution."

"10. That, by reason of the fact that said deed, copy of which is hereto attached, marked 'Exhibit B,' was obtained by undue influence, as aforesaid, the same is null and void and of no effect, and these complainants are entitled to receive and have the same set aside, delivered up and cancelled."

It is well settled that when a party seeks to have a deed declared to be void and delivered up to be cancelled on the ground of undue influence exerted over the mind of the grantor he must plead the facts constituting such undue influence, the rule of pleading in such cases being the same as in cases of fraud. 31 Cyc. 55; Jackson et al v. Rowell et al, 87 Ala. 685, 6 South Rep. 951; Barksdale et al v. Davis et al, 114 Ala. 623, 22 South. Rep. 17; Ellis et al v. Crawson, 147 Ala. 294, 41 South. Rep. 942; Frick v. Kabaker, 116 Ia. 494, 90 N. W. Rep. 498; Kelley et al v. Perrault et al, 5 Idaho 221, 48 Pac. Rep. 45; Heathcote v. Fairbanks, Morse & Co., 60 Fla. 97, 53 South. Rep. 950.

The term "undue influence" is not regarded as being susceptible of precise definition, but the authorities uniformly hold that undue influence, in order to render a deed void, must be of such a character as to overcome

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the will, deprive the grantor of free agency and substitute the will of another for that of the grantor. *Conley v. Nailor*, 118 U. S. 127; *McCall v. McCall*, 135 U. S. 167; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. Rep. 201; *Mallow v. Walker*, 115 Ia. 238, 88 N. W. Rep. 452; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. Rep. 1021; *Adair et al v. Craig et al*, 135 Ala. 332, 33 South. Rep. 902.

It may be that the facts constituting the alleged undue influence could be more fully set out, yet, in view of the allegations that the deeds of conveyance were made without consideration, that the grantor and grantee were parent and child, and that undue influence was exerted over the grantor in the execution of the deeds, such statements of ultimate facts or of conclusions not being negatived by the specific facts and circumstances alleged, the demurrer to the paragraphs now under consideration was properly overruled, since on the admissions of the demurrer it does not appear as matter of law that undue influence was not used and under the allegations a case entitling the complainant to relief may be made by appropriate and sufficient evidence showing that in effect the grantee's will was substituted for that of the grantor in the execution of the deeds. *Phifer v. Abbott*, 73 Fla. 402, 74 South. Rep. 488; *Johns v. Bowden*, 68 Fla. 32, 66 South. Rep. 155.

Paragraph eleven of the bill is as follows: "And your orators further show unto your Honor that said purported deed, copy of which is hereto attached and marked 'Exhibit B,' was never delivered by the grantor therein to the said defendant, Mrs. Annie May Pratt, but your orators show that, on the contrary, said John N. Carns, Sr., the grantor in said deed and the father of said defendant, instead of delivering said deed to said

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defendant, handed the same, in a sealed envelope to one George A. Kirk, Jr., assistant cashier of The Barnett National Bank, of the City of Jacksonville, Duval County, Florida, with the request that, if anything should happen to said John N. Carns, Sr., said George A. Kirk would hand said envelope to the defendant, Mrs. Annie May Pratt; that at the time said John N. Carns, Sr., handed said sealed envelope to said George A. Kirk, Jr., said John N. Carns, Sr., did not tell said George A. Kirk, Jr., what said sealed envelope contained; that said George A. Kirk, Jr., did not know what said sealed envelope contained until after the death of said John N. Carns, Sr.; that at all times while said sealed envelope containing said deed was in the possession of said George A. Kirk, Jr., it was subject to the direction and control of said John N. Carns, and there was nothing whatsoever that would have in any way prevented said John N. Carns, Sr., from requesting and requiring said George A. Kirk, Jr., to re-deliver said sealed envelope, with its contents, to said John N. Carns, Sr., nor had said John N. Carns, Sr., the father of your orators and of said defendant, Mrs. Annie May Pratt, deposited said sealed envelope containing said deed irrevocably with said George A. Kirk, Jr.; that after the death of said John N. Carns, Sr., said George A. Kirk, Jr., handed said sealed envelope containing said deed to the defendant, Mrs. Annie May Pratt, whereupon Mrs. Annie May Pratt, on the 3rd day of July, 1917, placed the same upon the public records of Duval County, Florida, as hereinbefore set out."

Delivery of a deed is essential to the passing of the title to the property intended to be conveyed to the grantee. The placing of the deed in the hands of a third person for future delivery to the grantee may constitute

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a delivery, but to accomplish this purpose it must be made to appear that in placing the deed in the hands of such third person the grantor intended to, and in fact did, relinquish and surrender all dominion and control over such deed. Porter v. Woodhouse, 59 Conn. 568, 22 Atl. 299; Johnson et al v. Johnson, 24 R. I. 571, 54 Atl. 378; Barrows et al v. Barrows, 138 Ill. 649, 28 N. E. Rep. 983; Abbe v. Justus, 60 Mo. App. 300; Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455.

In Johns v. Bowden, *supra*, this court said: "Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled."

In view of the allegations in this paragraph that the deed referred to was, while in the possession of the third person, "subject to the direction and control" of the grantor, taken together with other allegations, we think the paragraph, under the admissions of the demurrer, should be held good.

The order appealed from, in so far as it sustained the demurrer to the eleventh paragraph of the bill, is reversed, otherwise, it is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

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BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, A CORPORATION, *Plaintiff in Error*, v. FORBES PIONEER BOAT LINE, A CORPORATION, *Defendant in Error*.

Opinion Filed July 10, 1920.

Petition for Rehearing Denied July 28, 1920.

1. The State Constitution is a limitation upon the power of the Legislature, and unless legislation duly passed be clearly contrary to some expressed or implied prohibition in the Constitution the courts have no authority to pronounce it invalid.
2. The United States Constitution is also a limitation upon the powers of the States.
3. One who assails an act of the Legislature as unconstitutional has the burden of showing beyond a reasonable doubt that such act is in conflict with some designated provision of the State or Federal Constitution.
4. The constitutional prohibition against the passage of *ex post facto* laws is confined to laws respecting criminal punishment and has no relation to retrospective legislation of any other character.
5. The constitutional provisions against impairing the obligation of a contract apply only to voluntary contracts and not to obligations imposed by law without the assent of the party bound. That class of obligations aptly styled "quasi contracts" are not embraced within said provisions.
6. The passage of retrospective or retroactive legislation in Florida is not in terms forbidden by the State or Federal Constitutions, and such legislation is therefore valid unless invalid for some reason other than because of its retrospective nature.

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7. Generally speaking, vested rights can not be disturbed by retrospective legislation, but in its application as a shield or protection, the term vested rights is not used in any narrow or technical sense or as importing a power of legal control, merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect and of which the individual could not be deprived arbitrarily without injustice.
8. Generally speaking, the moral aspect of the right claimed may be given consideration in determining whether such right is protected by the due process of law clause of the Constitution, and if not morally right, such claim may be taken away by legislation retrospective in its nature.
9. The Board of Commissioners of Everglades Drainage District is a public quasi-corporation, and as such a governmental agency of the State for certain definite purposes, having such authority only as is delegated to it by law. It, therefore, had no power to charge toll for the passage of boats through its locks until authorized to make such charge by Chapter 7865, Acts of 1919, but having assumed to make such charge and having collected tolls prior to said act, it was competent for the State to ratify and validate such unauthorized charge and collection of tolls, notwithstanding a suit was then pending against said board to recover tolls so paid.

A Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Judgment reversed.

Glenn Terrell, for Plaintiff in Error;

Carson, Willard & Knight and *Thomas B. Norfleet*, for
Defendant in Error.

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REAVES, Circuit Judge.—The defendant in error, which we shall herein call the Boat Line for brevity, sued the plaintiff in error, which we shall call the Board, in the Circuit Court of Dade County to recover stated sums of money paid by the Boat Line to the Board as toll for the passage of its boats through the locks maintained by the Board in one of the canals constituting the Everglades Drainage System. The declaration filed July 2, 1917, seeks to recover payments from August 1, 1913. Omitting the style of the court and cause, the declaration is as follows:

“Forbes Pioneer Boat Line, a corporation, by its attorneys, sues the Board of Commissioners of Everglades Drainage District, a corporation, for that, on to-wit: August 1, 1913, the said plaintiff then and there being a corporation, and as such was engaged in the business of transporting by boat passengers and freight from Fort Lauderdale, Florida, to Rita Island, and other places in said State, and from Rita Island and other places to Fort Lauderdale, Florida; that in the conduct of its said business it became and was necessary for the boats of plaintiff to pass over, through and upon the waters of North New River Canal, which said canal, under and by virtue of an act of the Legislature of the State of Florida, approved June 6th, 1913, was and is for certain purposes, under the supervision and control of the defendant; that said defendants and their predecessor have caused to be constructed across and upon said canal a certain lock in Broward County, Florida, within the Everglades Drainage District for the purpose, among other things, of controlling and regulating the flow of water through said canal; that on, to-wit: August 1, 1913, the said defendant, through its servants, agents and employees, wrongfully demanded of and received from the plaintiff the sum of

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\$6.50 for toll for passage through the said lock of one of its boats, and has since that date, upon many divers occasions, and up to the present time, regularly made charges and collected tolls from the plaintiff upon each and every boat belonging to plaintiff which passed through said lock in the amount of ten cents per lineal foot and in the aggregate sum of \$864.00; that said sum so collected, and each item thereof, was wrongfully and unlawfully levied and collected. Wherefore plaintiff brings its suit and claims \$1,250.00 damages."

A demurrer to this declaration was sustained, and from the final judgment in favor of the Board a writ of error was taken by the Boat Line to this court, and the judgment reversed on May 30, 1919. See *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 77 Fla. 742, 82 South. Rep. 346.

An examination of this opinion will disclose that the judgment was reversed for the reason that the Board had no power under the law to collect toll for the passage of boats through the canals and locks constituting said system of drainage. On the same day upon which this opinion was handed down the Legislature enacted into law Chapter 7865, Acts of 1919, amending Section 3 of Chapter 6456, Acts of 1913, and by said amendment expressly authorized said Board to "provide for and regulate the collection of a reasonable schedule of tolls for the use of the said canals and locks," and further providing that "all tolls heretofore collected for the use thereof being by this act legalized and validated." The further provisions of the amendment not necessary to be quoted show more fully the intent of the Legislature that the canals might be used for the purpose of commerce, and that the

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Board might prescribe suitable regulations governing such use.

After the mandate was handed down the Circuit Court overruled the demurrer in obedience to the mandate of this court, and the defendant then filed a plea setting up the passage of said Chapter 7865, by virtue of which it was claimed that the said charges of toll had been validated and that the suit could no longer be maintained. A demurrer to this plea was sustained. Thereupon a judgment was entered in favor of the plaintiff for \$649.21, principal and, \$184.49 interest, and \$17.37 cost, it having been agreed between counsel for the respective parties that the said sum of \$649.21 had been paid, as claimed in the declaration. On this judgment the Board sued out a writ of error to this court.

The demurrer to the plea above mentioned raises the question of the constitutionality of that portion of Chapter 7865 which undertook to validate the charge and collection of the tolls in question.

The Act is attacked (a) as being an *ex post facto law*; (b) as impairing the obligation of a contract; and (c) as depriving the plaintiff of property without due process of law; and the various sections of the State and Federal Constitutions guaranteeing these rights are invoked, namely: Section 17, Bill of Rights; Section 12, Bill of Rights; Section 10, Article 1, U. S. Constitution; and 14th Amendment U. S. Constitution.

It is well to keep in mind that our State Constitution is a limitation upon power, and unless legislation duly passed be clearly contrary to some expressed or implied prohibition in the Constitution, the courts have no authority to pronounce it invalid. *Lainhart v. Catts*, 73 Fla. 735, 75 South. Rep. 47.

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We might add also that the Federal Constitution is a limitation upon the powers of the States, because "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Article 10, U. S. Constitution.

The inquiry then is whether or not the validation of the Act of said Board in exacting and receiving the tolls in question is prohibited by the State or Federal Constitution, and the well-settled rule is that the burden of showing beyond a reasonable doubt that the Act assailed is in conflict with some designated provision of the State or Federal Constitution rests upon the party assailing the Act. *Lainhart v. Catts, supra*.

Turning now to the various provisions of the organic law invoked by the Boat Line, let us determine their meaning, and application to the matter in issue.

(a) It is settled by the authorities that the prohibition against *ex post facto* laws is confined to laws respecting criminal punishment and has no relation to retrospective legislation of any other character. *Johannesen v. United States*, 225 U. S. 227, 56 L. Ed. 1066, 32 Sup. Ct. Rep. 613; *Cooley's Const. Lim.* (7th Ed.) 373; 12 C. J. Sec. 805, p. 1099.

(b) It is also settled that constitutional provisions against impairing the obligation of a contract do not apply to obligations imposed by the law without the assent of the party bound, even though by a legal fiction they may be enforced in an action in form *ex contractu*. In other words, the class of contracts protected are voluntary—that is, based on the assent of the parties, expressly or impliedly given. That class of obligations aptly

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styled "quasi contract" are not embraced within the constitutional guarantee against the passage of a law violating the obligation of a contract. *Louisiana ex rel. Folsom v. Mayor, etc., of City of New Orleans*, 109 U. S. 285, 27 L. Ed. 946, 3 Sup. Ct. Rep. 211; *State v. City of New Orleans*, 38 La. Ann. 119, 58 Am. Rep. 168; *Freeland v. Williams*, 131 U. S. 405, 33 L. Ed. 193, 9 Sup. Ct. Rep. 763. *Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 26 S. W. Rep. 1075, 24 L. R. A. 642; 12 C. J., p. 1053, Secs. 690, 691; 6 R. C. L., p. 326, Sec. 316.

(c) We now come to consider the question of whether the validating act under consideration deprives the Boat Line of property without due process of law. It should be kept in mind that neither the Federal Constitution nor the Constitution of Florida in terms forbids the passage of retroactive or retrospective laws, and such laws are therefore valid unless they violate some constitutional guarantee; or, in other words, unless invalid for some reason other than because of their retroactive nature. *Cooley's Const. Lim.* (7th ed.) 529; 12 C. J., p. 1084, Sec. 779; *Kentucky Union Co. v. Commonwealth of Kentucky*, 219 U. S. 140, 55 L. Ed. 137, 31 Sup. Ct. Rep. 171.

In the instant case it is insisted that the Boat Line had a vested right of action against the Board to recover back the tolls paid, of which it could not be constitutionally deprived. It is true that generally speaking vested rights are protected by the due process of law clause of the State and Federal Constitutions. *Cooley's Const. Lim.* 517, *et seq.*; 12 C. J., p. 956, Sec. 486. The difficulty often comes, however, in determining what is a vested right in the sense secured by the constitutional guarantee. No useful purpose would be accomplished by attempting a general definition, nor by quoting general definitions as given

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by the authorities. For a lengthy and enlightening discussion see Cooley's Const. Lim. (7th Ed.) 508, *et seq.* From this author we quote briefly as follows: "The chief restriction upon this class of legislation is that vested rights must not be disturbed, but in its application as a shield or protection the term 'vested rights' is not used in any narrow or technical sense or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect and of which the individual could not be deprived arbitrarily without injustice." For other definition see 12 C. J., p. 955, Sec. 485; 6 R. C. L., p. 308, Sec. 294.

In all the definitions and text books, as well as the adjudicated cases, the moral aspect of the right claimed is given consideration in determining whether the right is protected or not, and the rule generally announced is that if the claim is not morally right it may be taken away by legislation retrospective in its nature. For instance, defects in deeds or in the acknowledgment of deeds which it would be unjust for one to take advantage of may be cured. *Downs v. Blount*, 95 C. C. A. 289, 170 Fed. Rep. 15, 31 L. R. A. (N. S.) 1076, and cases cited in note.

Also, moral obligations of counties and municipalities have frequently been made binding by retrospective laws. *Utter v. Franklin*, 172 U. S. 416, 43 L. Ed. 498, 19 Sup. Ct. Rep. 183; *Jefferson City Gas-Light Co. v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

As stated by the Supreme Court of Massachusetts, a party can not have a vested right to do wrong. *Foster v. Essex Bank*, 16 Mass. 244. And by the Supreme Court of New Jersey, "Laws curing defects which would other-

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wise operate to frustrate what must be presumed to be the desire of the party affected cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case." *State v. Newark*, 27 N. J. L. 185. See also 6 R. C. L., page 311, Sec. 298, from which we quote: "It is axiomatic that no man has a vested right to do wrong. This principle may be applied in some instances in order to test the validity of retroactive legislation."

Cooley's *Const. Lim.* (7th Ed.), on page 533, quotes from *Beach v. Walker*, 6 Conn. 190, as follows: "The law undoubtedly is retrospective, but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable and for necessary services in the performance of his duty; of consequence they are eminently just, and so is the act confirming the levy. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced."

Again, from the same author on page 535, we quote: "On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy and not of constitutional power."

Again, the same author on page 536 quotes from the case of *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121, as follows: "That where a statute is expressly retroactive and the object and effect of it is to correct an inno-

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cent mistake, remedy a mischief, execute the intention of the parties and promote justice, then both as a matter of right and of public policy affecting the peace and welfare of the community the law should be sustained."

These authorities abundantly justify us in looking to the facts of the case at bar and determining whether the act in question is morally right as an aid to solving the question of whether it violates a constitutional guarantee. Before doing so, however, we might call attention to the fact that not all of the authorities agree that vested rights are always protected by the guarantee in question, but some instead of trying to determine what is a vested right, lay down the rule that rights vest subject to the equity against them and may be divested under proper circumstances. 2 Kents Com., p. 415; Grim v. Weissenberg S. D., 57 Pa. St. 433, 98 Am. Dec. 237.

In this case it is said that "it would be a nice and difficult task to trace accurately the boundary line between the domain of authorized and prohibited legislation on this subject;" but the court had no difficulty in sustaining an act which validated an unauthorized levy and collection of taxes for school purposes. Both lines of reasoning reach the same result.

Turning now to the facts of the case at bar, the court takes judicial knowledge of the various laws enacted for the drainage of the Everglades, and also that a system of canals of great size and depth has been constructed. That such canals are suitable for navigation as well as adapted to drainage is apparent from the fact that plaintiff is suing for the recovery of tolls paid for the passage of its boats through the locks, and also from the fact that the Legislature of 1919 recognized the value of such

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canals for transportation and authorized the Board to regulate such transportation and charge toll.

For three years, according to the declaration, the plaintiff's boats operated on one of these canals, passing through the locks constructed, maintained and operated by the defendant. That locks of the magnitude of which these must of necessity be are not constructed, maintained, or operated without cost, goes without saying. The plaintiff's contribution to this cost was the toll which it paid and for which it received value, both in facilities for transportation and in service by the operation of the locks. It engaged in commerce upon the waters in question as a business enterprise, and from the fact that the business was continued for three years, as shown by the declaration, and is doubtless still continuing, we may assume that the enterprise proved profitable. Moreover, it doubtless voluntarily paid the toll charged. In other words, it used the canals and locks because it chose to use them, paid the price charged for the service received, and received value for what it paid.

It so happens that the attempted contract by which tolls were charged and paid was not a contract because the agency of the State, namely: The Board was not authorized by the State to charge the toll in question. Presumably as soon as this was called to the attention of the Legislature, possibly by the suit of plaintiff's in this case, the Legislature corrected the defect and gave the Board ample power to charge toll in the future, and also ratified the action of the Board in assuming to charge toll in the past. That this act is a valid exercise of legislative power seems clear, both on principle and authority. On the prior writ of error we held that "the Board of Commissioners of Everglades Drainage District is a pub-

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lic quasi corporation, and as such a governmental agency of the State for certain definite purposes, having such authority only as is delegated to it by law." We there held that the Board had been granted no power to charge toll, therefore it had no power. In other words, the agent of the State acted in the name of the State without authority. The Act in question not only conferred the authority for such action in the future, but ratified the unauthorized acts of the past. That such ratification was not inhibited by the Constitution is settled by the case of *United States v. Heinszen & Co.*, 206 U. S. 370, 51 L. Ed. 1098, 27 Sup. Ct. Rep. 742.

In this case it appears that duties had been illegally collected upon shipments of goods to and from the Philippine Islands and Porto Rico for a number of years following the Spanish-American War under an order of the President, which order was held to be without power and the duties so collected held to be unauthorized in several cases then and previously pending before the Federal Courts. After the courts had held such duties to be unauthorized Congress passed a law ratifying and validating the same and enacting a tariff for the said Islands. Mr. Justice WHITE (now Chief Justice) disposed of the contentions made against the law by holding that the agents of the government had simply acted beyond their authority in making the collection, and that Congress had the power to ratify such acts, even after it had been judicially determined that the power did not exist and that the claimants might recover the sums so paid. This opinion quotes from Kent in his commentaries, volume 2, page 415, as follows: "The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the

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statutes recognized and enforced." Under this quotation is cited a number of authorities, including *Goshen v. Stonington*, *supra*. See also *Hamilton v. Dillon*, 21 Wall. (U. S.) 73, 22 Law Ed. 528; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Town of Bellevue v. Peacock*, 89 Ky. 495, 12 S. W. Rep. 1042, 25 Am. St. Rep. 552; *Nottage v. City of Portland*, 35 Ore. 539, 58 Pac. Rep. 883, 76 Am. St. Rep. 513. The following decisions of this court are also helpful: *Taylor v. Tennessee & Florida Land & Investment Co.*, 71 Fla. 651, 72 South. Rep. 206; *Cranor v. Volusia County Com'rs.*, 54 Fla. 526, 45 South. Rep. 455; *Givens v. Hillsborough County*, 46 Fla. 502, 35 South. Rep. 88, 82 South. Rep. 770.

It should be said that the various decisions legalizing the obligations of counties and other political subdivisions of the State, or public corporations, or public quasi corporations, while persuasive, are not decisive of the question here involved, because in such instances the State is dealing principally with its own rights, or rights of its governmental subdivision, and we have not overlooked the contention of counsel for the Boat Line that a right of action having accrued in its favor has become vested and can not be divested. The authorities stated relating to the question of vested rights and the divesting of rights fully cover this contention. It will be noted that the argument, if sound, would give more than a right of action. It would give a right of recovery. This is not a case of tort, nor otherwise of unliquidated damages. It is an effort to recover definite sums of money paid out, and if it be conceded that the Boat Line has a vested right of action, then it would have a vested right of recovery, because the action involves the recovery of the fixed sum about which there is no contention or dispute.

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For the reasons stated, the judgment is reversed.

TAYLOR, WHITFIELD AND ELLIS, J. J., concur.

BROWNE, C. J., dissents.

WEST, J., disqualified.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTS-
BURG, PENNSYLVANIA, *Plaintiff in Error*, v.
T. J. CONE, *Defendant in Error*.

Opinion Filed July 12, 1920.

1. The provisions in a standard fire insurance policy requiring the insured to notify the company in writing of the loss and to furnish proof of such loss are conditions precedent to the right to sue, but the failure to comply with said provisions promptly does not invalidate the policy or work a forfeiture of the rights of the insured in the absence of a stipulation to that effect.
2. An objection to the introduction in evidence of the original fire insurance policy sued on because of variance between the names of the persons signing as president and secretary as shown by said original policy and the copy attached to the declaration was properly overruled when the court was unable to distinguish from the signatures whether they were the same or not and when the company's agent who issued the policy and whose name was properly given in the copy, identified the policy as the one signed by him and delivered to the plaintiff covering the property in question.
3. A motion to strike testimony must not be too broad. If it includes any proper testimony it should be denied.

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4. Where a question propounded to a witness is not shown by the record to have been answered, an assignment of error based on an objection thereto must fail.
5. A question of fact upon which the evidence conflicts is peculiarly within the province of the jury to decide.
6. Where a fire insurance policy provides that loss shall not be payable until sixty days after the proof of loss has been furnished, interest on the amount due does not run prior to said time.
7. Where a motion for a new trial is sufficient to direct the attention of the trial court to harmful error in the general charge given, such error should be corrected.
8. The courts should exercise care and caution in decreeing attorney's fees to the end that only reasonable fees for services rendered be allowed, but where a cause is brought to an appellate court, not to have the amount allowed for attorney fees alone reviewed, but other questions as well, the allowance for attorney's fees will not be disturbed when it appears not to be excessive in view of services rendered in both the trial and appellate courts.
9. Trial courts should not fix the amount of attorney's fees in anticipation of a possible or probable appeal or writ of error.

A Writ of Error to the Circuit Court for Alachua County; J. T. Wills, Judge.

Judgment affirmed.

E. G. Baxter and *F. Y. Smith*, for Plaintiff in Error;

W. S. Broome and *Thos. W. Fielding*, for Defendant in Error.

N. U. F. I. Co. v. Cone—Opinion of Court.

REAVES, Circuit Judge.—T. J. Cone, whom we shall call the plaintiff, sued the National Union Fire Insurance Company of Pittsburg, which we shall call the defendant, in the Circuit Court of Alachua County, to recover for damage done by fire to a building owned by the plaintiff, and insured by the defendant. The property was insured for \$700.00. The fire occurred December 1, 1916. The company was notified in writing, and proper proof of the damage furnished as required by the contract, on August 4, 1918. The verdict and judgment gave the plaintiff \$225.00 damages, with interest at 8% from the day of the fire, amounting to \$45.00, and attorney's fees, \$150.00.

The first assignment of error complains of the order of the court in sustaining a demurrer to the defendant's first and second amended pleas. By the first of these pleas it is alleged that the plaintiff ought not to have or maintain his action, for the reason that the policy provides that "if fire occur the insured shall give immediate notice of the loss in writing to this company," and that such notice was not immediately given, but was delayed as hereinbefore stated; and the second plea is similar, except that it alleges delay in furnishing the proof of loss required by the policy. That these provisions in a standard fire insurance policy are conditions precedent to the right to sue and the failure to comply with them promptly does not invalidate the policy or work a forfeiture of the rights of the insured in the absence of a stipulation to that effect is settled by the decision of this court in *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 South. Rep. 62.

It is next assigned that the court erred in overruling defendant's objection to the introduction of the policy

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in evidence. The defendant, by proper plea, had denied the making of the policy sued on, and the objection to the introduction of the policy offered is based on a supposed variance between the names of the persons signing as president and secretary and the corresponding officers as named on a copy of the policy attached to the declaration. The court, in overruling this objection, said he was unable to distinguish from the signatures whether they are the same or not. It is, therefore, manifest, that we cannot hold the trial court in error, inasmuch as the original policy is not before this court for examination. Moreover the company's agent who issued the policy, and whose name is properly given in the copy attached to the declaration, identified the policy offered in evidence as the one signed by him and delivered to the plaintiff covering the property in question. It is, therefore, manifest that the defendant was not misled, even if it be true that the copyist failed to correctly decipher and reproduce the names.

The third assignment is that the court erred in refusing to grant the motion of the defendant to strike all the testimony of the witness P. H. Perry. The ground of the motion is that Perry, in his estimate of the cost of replacing the building, has based the estimate on the cost of new material, instead of material of the character in the building at the time of the fire. This motion was properly overruled. It was too broad. The witness had described the extent of the burning and given an estimate of the amount of material required to replace the burnt portions. To describe the effect of the fire certainly was proper testimony, and any motion to strike including this testimony was properly overruled. Again, it had been testified that used material—such as that in the building—could not be bought in the market, hence estimates

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were necessarily based on the cost of new material, and it cannot be said that such an estimate was of no assistance to the jury in determining the extent of the loss.

The next assignment is directed against an opinion of the witness Hiatt as to what it would cost to repair burnt portions, it being claimed that Hiatt had not properly qualified as an expert. The witness had testified that he had been a contractor and builder in Gainesville, Florida, for seventeen years, and had followed said trade in Gainesville and other places for thirty years, and that he had examined the buildings, etc. The fire occurred at Alachua, in Alachua County, and it cannot be said that a witness with such extensive experience at a nearby town as Mr. Hiatt is shown to have had, is not competent to testify in the manner indicated.

The next assignment is based upon the order of the court overruling defendant's motion "to strike all that part of the testimony" of the witness Hiatt "relating to smoke in the room and the fallen plastering and the holes that he testified about through the walls as he has not shown that he knows it came from the fire in question." This witness had described the condition of the building, stating that the roof was burned off of the dining room and kitchen, the rafters were charred, etc., and that a hole was broken through into the main body of the house, "by trying to put the fire out," he supposed, and that the plastering was broken and the ceiling smoked in the main body of the house. It was certainly competent for the witness to describe the conditions as he found them at the house, and it was for the jury to determine whether or not the evidence of smoke which he saw on the ceiling and plastering was the result of the fire in question.

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There was nothing in the evidence indicating that it was due to any other cause.

The question forming the basis of the 6th assignment of error is not shown by the record to have been answered, hence that assignment must fail. The 7th, 8th, and 9th assignments are that the verdict is contrary to the evidence, contrary to law, and the damage allowed is excessive. The estimate made by the witness for the plaintiff indicated that the damage was more than the jury allowed, while an estimate made by a witness introduced by the defendant, and which he claimed to have made shortly after the fire, showed a very slight damage. This was a matter peculiarly within the province of the jury to determine, and their finding was properly not disturbed by the trial court.

The 11th assignment is that the verdict allowing interest from December 1, 1916, is contrary to law. This is well taken, because, under the terms of the policy, the loss was not payable until sixty days after the proof of loss had been furnished; and the declaration and evidence show that the proof was not furnished until August 14, 1918. Therefore the interest allowed was excessive to the amount of \$33.00 and a remittitur of that amount should be made. It is argued that the defendant cannot be heard to complain of this error because the court charged the jury that they might allow interest from December 1, 1916, and the defendant did not except to this charge. It is true that no exception at the time the charge was given is shown by the record, but, under the statute, a charge given by the court of his own motion may be excepted to in the motion for a new trial, and the motion for a new trial in this case assigns, among other matters, the following: "Because the verdict

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fixing the rate of interest from December 1, 1916, is contrary to law." This was sufficient to direct the attention of the trial court to the matter of interest, and the error should have been corrected.

The 10th assignment is that the attorney's fee allowed by the judgment is excessive. "The courts should exercise care and caution in decreeing attorney's fees, to the end that only reasonable fees for services rendered be allowed." *Purvis v. Frink*, 57 Fla. 519, 49 South. Rep. 1023.

"The opinion evidence of expert witness as to the value of an attorney's services is not conclusive nor is it binding either on the court or on the jury." *Evors v. Bryan*, 77 Fla. 399, 81 South. Rep. 513.

This was a simple case, the declaration is in the statutory form, the testimony was short and the recovery small. An attorney's fee of \$150.00 for recovering \$225.00 under such circumstances seems out of proportion. A fee of \$75.00 would have been more in harmony with the facts of the case at bar and the law as declared and applied by this court in the cases above cited. But the case was brought up not to have the amount of attorney's fee alone reviewed, but many other questions as well, and, therefore, we should not disturb the allowance for attorney's fee when it appears not to be excessive in view of services rendered, both in the trial and appellate courts. *Purvis v. Frink*, 61 Fla. 712, 54 South. Rep. 862; *Morris v. City of Gainesville*, 60 Fla. 338, 53 South. Rep. 739.

But we must not be understood as approving any practice whereby a trial court may fix the amount of attorney's fee in anticipation of a possible or probable appeal or writ of error, and if any language used in the

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opinion in *Morris v. City of Gainesville*, *supra*, seems to so state, such language is disapproved and any such intent disclaimed. Should an unreasonable amount be allowed by a trial court and the cause be brought to this court upon that question alone, it would be our clear duty to grant relief without reference to services in the appellate court.

The judgment should be affirmed upon plaintiff entering a remittitur of \$33.00 to cover the excess interest.

PER CURIAM.—The record in this cause having been considered by this Court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the Court as its opinion, it is considered, ordered and adjudged by the Court that the judgment herein be, and the same is hereby, affirmed.

BROWNE, C. J. AND TAYLOR, WHITFIELD, ELLIS, AND WEST, J. J. CONCUR.

BEN HAIMOVITZ, *Appellant*, v. DANIEL HAWK, SR., SOL TAYLOR, SAM KENT, ELBERT FRYER, CARLOS SUTTON AND JOHN MILLER, AS TRUSTEES FOR THE ST. MATTHEWS MISSIONARY BAPTIST CHURCH, A VOLUNTARY ASSOCIATION, *Appellees*.

Opinion Filed July 12, 1920.

1. After a demurrer to the whole bill is overruled a second demurrer to the whole bill is not allowable.
2. To an amended bill the defendant has a right to interpose a new demurrer, notwithstanding a previous demurrer to the bill has been overruled.

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3. The orderly procedure for testing the legal sufficiency of a bill, whether before or after amendment, is by demurrer, and in this way only can the question be saved for review on appeal.
4. The execution of notes and a mortgage on real estate to secure the payment of such notes by individuals as trustees is sufficient to put persons dealing with such instruments upon inquiry of the powers possessed by such individuals.
5. Where the validity of instruments sought to be enforced depends upon whether the persons executing such instruments had power to do so, it is necessary to allege and prove the existence of such power.
6. Where complainant relies for his cause of action on a ratification of an unauthorized contract by a trustee or agent he must set out the facts necessary to constitute such ratification.
7. When complainant asserts that validity has been imparted to an instrument invalid in its inception because of absence of authority in its makers to execute it, and upon the validity of which his right of recovery depends, he should set up the facts imparting such validity in order that defendants may know of what the cause of action consists.

An Appeal from the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Decree affirmed.

J. T. Watson, for Appellant;

Macfarlane & Macfarlane, for Appellees

WEST, J.—Suit was brought to foreclose a mortgage upon real estate. The suit was in the name of the payee and owner of several promissory notes and the mortgage

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which was given to secure their payment. The notes and mortgage were made by certain alleged trustees of the congregation of a designated church.

The original bill of complaint was demurred to. Thereupon an amended bill was filed. The amended bill was also demurred to. Upon a hearing on this demurrer an order was made overruling it as to all the grounds alleged except one, and as to this ground the demurrer was sustained. The demurrer raised the question of the sufficiency of the allegations of the bill with respect to the authority of the trustees to make the mortgage upon the property of the church, and also with respect to a ratification by the congregation of the alleged action of the trustees in executing such mortgage.

The ground of the demurrer upon which it was sustained raised the question of the necessity of making the membership of the congregation parties defendant. It was sustained upon this ground for the reason, as stated in the order, that the bill did not allege sufficient reason for not making the membership of the congregation parties defendant. The complainant at the hearing asked permission to amend his bill instantler. Permission to do so was granted and the amendment, so the order recites, was thereupon, by direction of the court, made by interlining it in the bill. The amendment so inserted alleged complainant's reason for his omission of the members of the congregation as parties defendant.

Defendants were allowed until the following rule day to further plead to the bill, at which time a demurrer to the bill as amended was filed.

Upon this appeal the contention is made that the demurrer to the amended bill as amended amounted to a sec-

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ond demurrer to the same bill and was, therefore, under the established rule forbidding this practice, not allowable. This is the settled rule of chancery practice here as elsewhere. *Hull v. Burr*, 61 Fla. 625, 55 South. Rep. 852, 6 Ency. Pl. & Pr. 429. But the question here is does this rule apply to the case under consideration? The demurrer to the bill was sustained by the court because of the failure of complainant to sufficiently allege the reason for his failure to bring in as defendants persons whom the court conceived to be necessary parties defendant. To cure this defect pointed out by the court's ruling, upon application, leave was granted complainant to amend his bill and the bill was amended. Can it be said that in permitting complainant to insert an amendment the court passed upon the sufficiency of the bill as amended? We think not. In allowing amendments to pleadings or permitting amended pleadings to be filed courts do not necessarily pass upon the legal sufficiency of such amendments or amended pleadings. How then may the defendants test the sufficiency of complainant's amended bill as amended? Necessarily by demurrer. They can save the point for review by the appellate court in this way only. After the amended bill was amended it was not "the same bill" under the rule stated, and, therefore, the rule does not apply. *Bowes v. Hoeg*, 15 Fla. 403.

We consider then the controlling questions presented by the demurrer to the bill, namely, are the allegations of the bill sufficient to show authority in the alleged trustees to mortgage the property of their *cestui que trust*, the congregation of the church? and if not, are the allegations of ratification of such action sufficient to withstand the demurrer? Obviously these questions and the question of whether the members of the congregation

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should be made parties defendant, or a sufficient reason given for the failure to do so, are intimately related.

The bill contains the following paragraph: "Your orator further shows to the court that he does not know whether the execution of said note and mortgage on the part of said trustees was authorized by the said church at the time that the same were made and delivered to him, but he charges and alleges that the execution and delivery of said mortgage and note were subsequently prior to the institution of this suit, ratified and assented to by the said church society, the cestui que trust for the land described in said mortgage." It contains also an allegation that the defendants were trustees to hold the legal title to the mortgaged property, but in the brief on behalf of appellant, complainant below, filed in this court counsel says that he does not think that the alleged trustees had the power to mortgage the church property without authority from the members of the congregation. It would seem, therefore, that the admitted absence of any knowledge by complainant of any authority by said trustees to mortgage said property and the conceded necessity for such authority in order to give validity to such mortgage would eliminate from our consideration the first of the questions stated.

Both the notes and the mortgage are signed by the makers as trustees. This was sufficient to put complainant on inquiry of the powers possessed by them. *First Nat'l Bank v. National Broadway Bank*, 156 N. Y. 459, 51 N. E. Rep. 398; *Tuttle v. First Nat'l Bank*, 187 Mass. 533, 73 N. E. Rep. 560; *Loring et al. v. Brodie et al.*, 134 Mass. 453; *Gaston et al. v. American Exchange Nat'l Bank*, 29 N. J. Eq. Rep. 98, *Ferry et al. v. Laible*, 31 N. J. Eq. Rep. 566. Before such obligations can be enforced against

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defendants in their representative capacity it is necessary to show the authority for their execution. We hold, therefore, that since the validity of the instruments sought to be enforced depends upon whether the persons executing them had power to do so, it is necessary to allege and prove the existence of such power.

We pass therefore to the last question: Is the allegation of ratification of the action of the alleged trustees by the members of the congregation of the church sufficient? We have quoted the paragraph containing this allegation. It amounts to no more than a conclusion of law. No facts constituting a ratification are attempted to be set out. Upon the question of the asserted ratification defendants are given no notice of what facts or transactions they may be required to meet. This, we think, is not sufficient. When complainant asserts that validity has been imparted to an instrument invalid in its inception because of absence of authority in its makers to execute it, and upon the validity of which his right of recovery depends, he should set up the facts imparting such validity in order that defendants may know of what the cause of action consists. *Purkey v. Harding et al.*, 23 S. D. 632, 123 N. W. Rep. 69; *Lauenstein v. City of Fond du Lac*, 28 Wis. 336; in *re Eckley v. Daniel et al.*, 193 Fed. Rep. 279.

There was no error in the order appealed from and the decree will be affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Long v. Pughaley—Syllabus.

FREDERICK W. LONG, *Plaintiff in Error*, v. G. W. PUGHSELEY, *Defendant in Error*.

Opinion Filed July 12, 1920.

PERSONAL INJURY ACTIONS—PATENT DANGERS
INCIDENT TO WORK NOT NECESSARY TO BE
POINTED OUT TO ADULT EMPLOYEE—EM-
PLOYER NOT AN INSURER OF EMPLOYEE
AGAINST INJURIES RESULTING TO LATTER
SOLELY FROM LATTER'S OWN CARELESS-
NESS AND NEGLIGENCE AND FROM NO
OTHER PROXIMATE CAUSE.

1. Where all of the dangers incident to the performance of any kind of work are so obvious, patent, open and plain to any mentally normal adult, that no information, cautions or instructions with reference thereto are necessary to be given to the adult employee doing such work to acquaint him therewith, it is not actionable negligence if the employer fails to give such cautions, information and instructions.
2. The employer is not an insurer of his employee against injuries resulting to the latter solely from the latter's own carelessness and negligence and from no other proximate cause.

A writ of error to the Circuit Court for Duval County,
Daniel A. Simmons, Judge.

Judgment reversed.

Marks, Marks & Holt, for Plaintiff in Error;

A. H. & Roswell King and *Bayard B. Shields*, for De-
fendant in Error.

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TAYLOR, J.—The defendant in error, hereinafter referred to as the plaintiff, brought his action for damages for personal injuries against the plaintiff in error, hereinafter referred to as the defendant, in the Circuit Court of Duval County, and recovered judgment for \$7,500.00 and the defendant by writ of error brings this judgment here for review.

The negligence alleged against the defendant in the first and third counts of the declaration (the second count being withdrawn and eliminated by the Court during the trial), is as follows:

“G. W. Pughsley, plaintiff, by A. H. King, Roswell King and Bayard B. Shields, his attorneys, in this first count of his declaration, sues Frederick W. Long, lately doing business as Clark Monument Company, defendant, for that on to-wit, the 5th day of September, A. D. 1916, defendant was the owner of and was operating, as Clark Monument Company, a certain stone and monument business, and was engaged in the construction of certain stone work around and over the northern entrance or doorway of a certain school house situated on the corner of Franklin and Seventeenth streets, near the City of Jacksonville, in Duval County, Florida; that on said day plaintiff was employed by defendant as a stone worker in and about the construction of the stonework over said doorway and was ordered by defendant to place and set up above the lintel of said doorway certain pieces of stone; that it then and there became and was the duty of defendant to use due care to furnish a reasonably safe place for plaintiff to work, and to furnish for doing said work reasonably safe and suitable instrumentalities, appliances, and materials; yet defendant, not regarding his duty in this behalf, wrongfully, negligently and carelessly

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furnished to plaintiff to be used in said work a certain thin, fragile, insufficient and inadequate slab of stone about two inches thick and about sixteen inches high, which he ordered plaintiff to set up over the lintel of said doorway to hold up other pieces of stone to be placed on top of it; and wrongfully, carelessly and negligently furnished and ordered plaintiff to place on top of, over, upon and jutting out beyond said slab of stone certain other pieces of stone of great size and weight, to-wit, of the weight of four thousand pounds; that said thin and fragile slab of stone was inadequate and insufficient to hold up said other large and heavy pieces of stone which plaintiff was ordered to place on top of it in this, that said thin and fragile slab of stone, so carelessly and negligently furnished by defendant, was only about two inches thick and was of small bearing capacity, whereas a much thicker slab and a slab of much greater bearing capacity to-wit, a slab six inches thick would have been required to hold said other large and heavy pieces of stone up and to keep them from falling; that defendant by the exercise of reasonable care might have known, and did know, of the insufficiency, inadequacy and unsuitableness of said thin and fragile slab to hold up said large pieces or boulders of stone, but plaintiff did not know the same; that plaintiff then and there, as he was ordered, placed said slab of stone over the lintel of said doorway, and placed on top of, over and jutting out beyond it said large and heavy bounders of stone; that thereupon said slab and heavy pieces of stone, without fault on the part of the plaintiff, and because of the aforesaid carelessness and negligence of defendant, slipped and gave way and fell down upon plaintiff with great force and violence; that because of and as the direct result of said carelessness and negligence of defend-

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ant, whereby said stone fell on plaintiff, plaintiff was greatly wounded, bruised, hurt and injured * * * that on said day plaintiff was employed by defendant as a stone worker, and was ordered and directed by defendant to place and set up above the lintel of said doorway certain pieces of stone of great size and weight, to-wit, of the weight of four thousand pounds; that plaintiff was then and there ordered by defendant to place said pieces of stone on top of a certain thin and fragile slab furnished by defendant, one on top of the other, those at the top jutting out over those at the bottom, and to set them up thus in the air, no wall or other structure to which said pieces of stone might be tied or anchored and kept from falling having been furnished by defendant; that to set up said pieces of stone in the manner plaintiff was ordered to set them up as above set out was a work of great risk and danger; that plaintiff is a stone cutter by trade, and on said 5th day of September, A. D. 1916, had been employed by defendant as a stone cutter for about two years; that until defendant began the construction of the stone work on said school house, plaintiff has never been employed as a stone mason, and on said day he was without skill or experience in setting up or constructing stone or other material in a wall or building; that plaintiff, on account of his said inexperience and lack of skill in such work, was ignorant of and was unable to appreciate the said great risk and danger of setting up said pieces of stone in the manner ordered by defendant and with the materials and appliances furnished by him, as aforesaid; that defendant by the exercise of reasonable care should have known and did know, of the said great risk and danger and of the inexperience and lack of skill of the plaintiff; that it then and there became and was the duty of defendant to warn plaintiff

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of said great risk and danger, and to so instruct, supervise and control him as to enable him to perform said work in reasonable safety; yet the defendant not regarding his duty in this behalf, ordered and required plaintiff to do said work and negligently, carelessly and wilfully failed and neglected to warn plaintiff of the risk and danger aforesaid or to so instruct, supervise and control him as to enable him to perform said work in safety; that plaintiff then and there set up said pieces of stone as he was ordered by defendant as aforesaid; that there upon said large and heavy pieces of stone, without fault on the part of plaintiff, and because of the aforesaid carelessness and negligence of defendant in failing to warn and instruct plaintiff, slipped and gave way and fell down and upon plaintiff with great force and violence; that because of and as the direct result of the said carelessness and negligence of defendant, whereby said stones fell on plaintiff, plaintiff was greatly wounded, bruised, hurt and injured;" * * *

Our conclusion, after a careful consideration of the record in this case, is that the recovery had thereon is not warranted by the facts in proof, or by the law applicable to those facts; and that the plaintiff on his own testimony alone as exhibited in the record can never lawfully recover anything from the defendant below for his injuries, severe as those injuries no doubt were. And why? Because, according to the plaintiff's own story of the accident, his injuries resulted entirely from his own carelessness and negligence that was the sole proximate cause of such injuries. It is strenuously insisted here that he was inexperienced in the kind of work he was doing when the accident happened, and that the defendant was negligent in not informing him of the dangers

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incident to that character of work. The plaintiff was a full grown adult of normal mental capacity, and according to his own story, and to the uncontradicted testimony of other witnesses, had, successfully and without accident, as a stone mason, put up the ornamental stone trimmings in and around two other doors in the same building. He was boss of the job, having two common laborers under him to assist him. He was a freeman, and was under no obligation to engage in this stone laying operation if he was inexperienced in the work, and should have declined the employment in it, if he was so obtuse as not to see and know the obvious and patent danger resulting from the natural law of gravitation that a heavy stone placed and left without sufficient supports will inevitably fall to the ground and that if he gets under it in its fall it will not be conducive to the health of his anatomy. This plaintiff himself supervised and assisted in the erection of the scaffolding on which to do his work. He, with the help of his assistants hoisted the stone blocks from the ground to the place where they were to be placed in the wall. He himself adjusted and laid those stones in their places, and after laying them they fell upon him inflicting the injuries for which he sues herein for damages. But it is contended for the plaintiff that the stones fell because the defendant negligently failed to have put in the necessary brick work to support them, or to which they could be anchored. If it was true that such brick work was not in place, and if it was necessary to the safety of the plaintiff in doing his work, both facts were plainly and patently obvious to the plaintiff who was right there on the spot, and it was his duty to decline to lay the stones in the absence of such supporting brick work, and in such case it was his own negligence in un-

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dertaking to lay heavy stones above the ground without proper supports to prevent their falling.

Again it is strenuously contended that the defendant was negligent in furnishing to the plaintiff a thin slab of stone called a name plate or freize to be put in the wall under the heavy stones above it that was only two inches thick, when it should have been five or six inches thick as called for by the architect's plans and specifications for the building. There is not a scintilla of evidence that the placing of this two-inch slab of stone in the wall contributed in the remotest degree to the fall of the large heavy stones above it. On the contrary the uncontradicted testimony shows that this thin name plate stone was put in by the plaintiff himself, was backed up with brick work flush with its upper edge, and served the purpose only of a veneering finish over the brick work. But again, we have no peonage in this country. The plaintiff was a freeman adult of normal mental capacity, and if the thinness of this name plate slab added to the dangers of his job, it was patent and obvious to him, and he was perfectly free to decline to put it in there, and he in that case was negligent in consenting to put it in or in working at it at all. All of the dangers incident to the work doing by the plaintiff were so obvious, patent, open and plain to any mentally normal adult, that no information, cautions or instructions with reference thereto were necessary to be given to the plaintiff by his employer or any one else, and there was, therefore, no actionable negligence in the defendant's failure to undertake such cautions, instructions, etc. *German Am. Lumber Co. v. Hannah*, 60 Fla. 70, 53 South. 516.

Evidently from the whole case these heavy stones fell immediately after being laid and placed by the plaintiff

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himself with his own hands. There must have been carelessness and negligence in the laying and placing thereof, and if so, whose was the fault? Clearly the plaintiff's own fault, and he cannot, therefore, recover for his injuries. The employer is not an insurer of his employee against injuries resulting to the latter solely from the latter's own carelessness and negligence, and from no other proximate cause. *Leynes v. Tampa Foundry & Machine Co.* 56 Fla. 488; *Perkins v. Morgan Lumber Co.* 68 Fla. 503.

The Court below erred in refusing to give the affirmative charge requested by the defendant, and erred in entering the judgment against the defendant, and erred in the refusal of the defendant's motion for a new trial.

The judgment of the court below is hereby reversed at the cost of the defendant in error.

BROWNE, C. J. AND WHITFIELD, ELLIS AND WEST, J. J.,
concur.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,
Plaintiff in Error, v. W. A. TURMAN, *Defendant in Error*.

Opinion Filed July 12, 1920.

A Writ of Error to the Circuit Court of Duval County;
Daniel A. Simmons, Judge.

John L. Doggett, for Plaintiff in Error;

George C. Bedell and *A. H. & Roswell King*, for Defendant in Error.

Williams v. State ex rel. Taylor—Syllabus.

PER CURIAM.—This writ of error was taken to a judgment awarding \$10,000.00 damages for personal injuries. At the trial the court admitted in evidence a letter relative to the injury, written by Turman to the defendant's law agent, in which the plaintiff wrote: "the left side of my face and both legs were badly burned," and "I was earning \$1.65 per day," but excluded the words "I expect the railroad to pay me \$2,000.00 for my damages."

It appears from the letter that it was not an offer to accept a reduced amount as a compromise, but a statement of the injuries received and the value thereof. The letter should have been admitted as an entirety.

In view of the damages awarded, the exclusion of the statement of the plaintiff as to the damages sustained was harmful to the defendant. On another trial, if it clearly appears that the Federal law is applicable, the charges given will be framed to conform to the controlling law.

Judgment reversed for a new trial.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

RALEIGH FRED WILLIAMS, *Plaintiff in Error*, v. STATE OF FLORIDA, *ex rel.*, GRIZELLE LUCILE TAYLOR, *Defendant in Error*.

Opinion Filed July 12, 1920.

1. In a proceeding in bastardy where the defendant is adjudged to be the father of the bastard child, and to pay a cer-

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tain sum of money for its support, it is error for the judge to sentence the defendant to jail at hard labor in default of compliance by him with the terms of the judgment.

2. In a bastardy proceeding the exhibition of an infant in its mother's arms to the jury and using the infant as an informal exhibit by permitting reference to it by the witnesses, and thus enabling the jury to make comparisons between its features and those of the reputed father, constitutes reversible error.

A Writ of Error to the Circuit Court for Leon County;
E. C. Love, Judge.

Judgment reversed.

Fred H. Davies, for Plaintiff in Error;

W. C. Hodges, for Defendant in Error.

ELLIS, J.—This case is a proceeding in bastardy. The plaintiff in error was adjudged to be the father of the bastard child of Grizelle Lucile Taylor, and to pay forty-eight dollars per year for ten years toward the support of the child, to give bond with sufficient sureties to secure the performance of the obligation placed upon him by the judgment, to pay the costs of the proceeding, and upon default in compliance with the judgment to be imprisoned by confinement in the county jail for a period of eight months at hard labor.

It is contended that the judgment is erroneous in that the alternative provides for imprisonment at hard labor. This criticism of the judgment is sound. One who in proceedings in bastardy is adjudged to be the father of a bastard child is not a convict within the meaning of

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Section 4010 of the General Statutes of Florida, 1906, which provides that: "When punishment of imprisonment in the county jail is awarded against any convict, the court may also sentence the prisoner to be employed at hard labor, and in such case he may be employed at such manual labor as the county commissioners may direct."

Chapter 4154, Acts of 1893, which is now Section 2601 of the General Statutes, provides that in all cases of bastardy where the judgment is rendered against the reputed father of the child, the court shall in such judgment specify a certain time for which the defendant shall be imprisoned in case of refusal or failure to comply with the judgment. The feature of the statute prescribing and limiting the term of imprisonment does not change the nature of the action, which is civil, not criminal. See *Bond v. State ex rel. Jarvis*, 34 Fla. 45, 15 South. Rep. 591; *Flores v. State*, 72 Fla. 302, 73 South. Rep. 234. Nor does the statute authorize the imposition of penal service upon the defendant as if he had been convicted of some crime.

There may be very good reasons why the legislature should direct such judgment to be imposed, but it has not yet acted upon them.

The complaining witness, a young woman of eighteen years of age, was the only witness in her behalf, unless the ten months old infant which during the entire trial she held in her arms, and while testifying referred to as "my child," and that the defendant was the father of it, could be considered as a witness or an exhibit. This procedure was allowed over the objection of the defendant.

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The child was in the view of the jury. It was referred to as "*this* is my child," making it thereby an informal exhibit in the case. It was not actually offered in evidence, but the same advantage was sought and doubtless obtained by producing the mother with the infant in her arms and causing her to sit within the bar during the entire trial, thus making of the infant an informal exhibit, enabling the jury to make whatever comparisons it desired between the child and putative father, but even then not under the most favorable circumstances. It was impossible, however, for the defendant to know what comparison each juror made or could have made. Whether they saw fancied or real resemblances in features or not, no one knows; but the opportunity was provided for comparison; indeed under the circumstances comparisons would be made involuntarily. While the infant under this practice was not a formal exhibit, it was an informal one; while not technically offered in evidence, it was in fact in evidence as much so as any witness who took the stand. The trial court must have considered that such practice would in effect be an exhibition of the child for comparison with the putative father, because before ruling upon the motion to exclude the child from the view of the jury he inquired of the mother under oath the age of the infant, and being informed that it was ten months old denied the motion.

The purpose of the inquiry was doubtless to ascertain whether in the court's judgment the infant was old enough to possess settled features or other corporal indications, and deeming it to be old enough to possess a sufficient number of permanent or settled features to enable the jury to make its own comparisons with a reasonable degree of accuracy, allowed the child to be held in its mother's arms before the jury during the trial, thus

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making of it an exhibit for all such purposes of comparison as the jury might devise. But this method did not give to the defendant the opportunity to object to the evidence on account of any inherent weakness and unreliability, his counsel probably did not treat the court's ruling as one upon the competency of evidence to which specific objections had been made to its introduction, nor did the practice which was pursued result in a comparison specifically of any one or more features and a discussion of those points of fancied or real resemblance.

If the jury in this case was in any wise influenced in its verdict by any comparison of features or bodily indications between the infant and the reputed father, something which it was entirely possible for them to do, and which any normal person would under the circumstances involuntarily do, although a moment's reflection might reveal the unsatisfactory character of the argument based upon a fancied resemblance between the two, the defendant could only guess at the point of similarity which the jury might have perceived and he would be deprived utterly of the right to a review of the evidence by an appellate court. Such were the views of this court as expressed in the Flores case *supra*.

We think that the proceedings complained of by the counsel for plaintiff in error in this regard were in effect contrary to the spirit if not the letter of the rule which this court in the Flores case said was the better one to follow in such cases. And that the possible harmful result upon the defendant consequent upon the error necessitates a reversal of the judgment.

The judgment is reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

FLORIDA EAST COAST FRUIT LAND COMPANY, A CORPORATION, *Appellant*, v. J. F. MITCHELL, AS CLERK OF THE CIRCUIT COURT OF BREVARD COUNTY, FLORIDA, AND W. C. FOSTER, *Appellees*.

Opinion Filed July 13, 1920.

1. A valid assessment of lands is an essential foundation to proceedings to subject them to sale for non-payment of taxes.
2. A description of land in the assessment roll, so faulty as not to warn the owner of the charge upon his land or to advise possible purchasers what land is to be sold will invalidate the assessment.
3. Where a sale is for an entire tax and a part of it is legal and part illegal, the illegal portion vitiates the entire sale.
4. Where several tracts or parcels of land are assessed and sold for taxes, and the amount of taxes assessed upon each of said tracts is not set down or given opposite thereto respectively, in the assessment roll and in the collector's advertisement of sale, but the aggregate taxes assessed on all the different tracts is given only, a tax deed predicated thereon is void.
5. If a statutory provision on the subject of redemption of lands sold for taxes is not a complete and certain one that applies in all situations, as where it depends on the discretion of the Comptroller, whose discretion cannot be controlled by mandamus, it is not such an adequate remedy as will prevent a court of equity from granting relief.

An Appeal from the Circuit Court for Brevard County;
James W. Perkins, Judge.

Judgment reversed.

F. E. C. F. L. Co. v. Mitchell et al.—Opinion of Court.

N. P. Bryan, for Appellant;

Landis, Fish & Hull, for Appellees.

BROWNE, C. J.—This is a proceeding by the Florida East Coast Fruit Land Company to have a tax sale certificate cancelled and to obtain appropriate ancillary relief by injunction. A demurrer to the bill was sustained, the bill dismissed and complainant appealed.

The bill alleges, among other things, that the Florida East Coast Fruit Land Company "was the owner and in possession of Section 40, in Township 20 South, of Range 34 East, containing 413.62 acres according to the Government survey, and of Sec. 41, Township 20 South, of Range 35 East, containing 285 acres according to the government survey; that all the lands are situated in Brevard County; that the Clerk had published notice of application by the defendant, Foster, for tax deed to property described as follows: "South half of Wm. Garvin Grant, Sections 37, 40 and 41, Township 20 South, Ranges 34 and 35 East, 1,000 acres;" and that Foster, one of the appellees, had made application for a deed to the land described in the notice and that unless the Clerk was restrained, he would issue a deed to Foster.

It is urged in objection to the assessment, "that the lands were not assessed according to the Government survey; that more than one section was included in one assessment; that lands lying in two ranges were assessed together. that the two ranges had been surveyed and platted by the United States Government prior to the assessment; that there is a Section 37 and a Section 40 and a Section 41 in each of the Townships included within 'Township 20, Ranges 34 and 35,' and that the aggregate

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acreage of these sections is nearly 7,000 acres; that Section 41, in Range 34, contains nearly 4,300 acres, and that the assessment is inconsistent with the Government survey; that the thousand-acre assessment is neither the half nor the whole of the lands attempted to be described; that the description is not by metes and bounds, nor made in accordance with a private survey or description recorded in the office of the Clerk or by reference to any deed; that the Wm. Garvin Grant is rectangular in shape and does not lie North and South, nor East and West; that Sections 37 and 40, Range 34, are not owned by the same person, and that Sections 37 and 41, Range 35, are not owned by the same person."

The demurrer admits the truth of these allegations.

We think the assessment is vague, uncertain and indefinite and not made in accordance with law, and is not a valid one of the lands of the complainant, which is an essential foundation to proceedings to subject them to sale for non-payment of taxes. *McKeown v. Collins* 38 Fla. 276, 21 South. Rep. 103.

This court has held that "A description of land in the assessment roll, so faulty as not to warn the owner of the charge upon his land or to advise possible purchasers what land is to be sold will invalidate the assessment." *Miller v. Lindstrom*, 45 Fla. 473, 33 South. Rep. 521, Headnote 1. Also, "A description of lands on an assessment roll so faulty as not to enable the purchaser to identify the land thereby, is an invalid assessment." *Grissom v. Furman*, 22 Fla. 581.

"Where a sale is for an entire tax and a part of it is legal and part illegal, the illegal portion vitiates the entire sale." *Graham v. Florida Land & Mortg. Co.*, 33 Fla. 356, 14 South. Rep. 796, Headnote 6.

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“Where several tracts or parcels of land are assessed and sold for taxes, and the amount of taxes assessed upon each of said tracts is not set down or given opposite thereto respectively, in the assessment roll and in the collector’s advertisement of sale, but the aggregated taxes assessed on all the different tracts is given only, a tax deed predicated thereon is void.” *Levy v. Ladd*, 35 Fla. 391, 17 South. Rep. 635, Headnote 4.

We do not think any of the statutory remedies are adequate to protect the complainant in this case. There was an application for a tax deed, which the appellant would in all probability have obtained before the complainant could avail himself of any remedy at law, and thus the object sought to be accomplished by the complainant in his bill to restrain the Clerk of the Circuit Court from issuing the deed to Foster, would have been accomplished.

The land assessed as “Unknown” was described “S½ of Wm. Garvin Grant, Sections 37, 40 and 41, Township 20 South, Ranges 34 and 35 East, 1,000 acres.”

The complainant owned about 698 acres, and some other person owned the remainder amounting to about 300 acres.

The Wm. Garvin Grant is rectangular in shape and does not lie North and South, nor East and West; and such a description is vague and incapable of determination.

Sections 37 and 40, Range 34, are not owned by the same person, and Sections 37 and 41, Range 35, are not owned by the same person. The vagueness, uncertainty and inadequacy of the description of the land as the South ½ of the Wm. Garvin Grant Tract, is rendered more uncertain by this attempt at further particular description.

F. E. C. F. L. Co. v. Mitchell et al.—Opinion of Court.

We do not think that under the facts in this case the complainant has an adequate statutory remedy under Sec. 570 of the General Statutes, 1906, because there seems to be no prescribed method by which it can be determined what portion of the taxes assessed against the entire body of land should be paid by the complainant.

Much confusion and injustice can readily result from assessing lands belonging to several persons, in the name of one, or as "unknown," if in order to prevent the loss of his property by sale for taxes, he should be required to pay a pro rata of the tax based upon the quantity of the land rather than on its value.

Thus if two lots of the same size belonging to different persons, one with improvements worth \$5,000.00, and the other with improvements worth \$50,000.00, were assessed as "unknown" at a valuation for both lots of \$75,000.00 should be sold for taxes, a pro rata of the tax based upon the quantity of land owned by each party would require each to pay half the tax, which would be a gross injustice to the one who owned the lot on which there were only \$5,000.00 improvements. And there seems to be no way in which this condition could be remedied under Section 570, or any other statutory proceeding.

It is true such a discrepancy is not made to appear in the instant case, but the adequacy of a statute to afford a remedy must be tested by any condition that may reasonably arise. If the remedy under the statute is not a certain one, that applies in all situations—if it depends on the discretion of the Comptroller, whose discretion can not be controlled by mandamus (*State ex rel. Kennerly v. Amos*, 78 Fla. 552, 83 South. Rep. 393) it is not such an adequate remedy as will prevent a court of equity from granting relief.

F. E. C. F. L. Co. v. Mitchell et al.—*Opinion of Court.*

There being no adequate remedy at law, statutory or otherwise, and the assessment being so vague, uncertain and indefinite as to render it void against the complainant, the demurrer to the bill should have been overruled.

The judgment is reversed.

TAYLOR AND ELLIS, J. J., concur.

WHITFIELD AND WEST, J. J., dissent.

WHITFIELD, J., dissenting.

This proceeding seeks to have an assessment of lands adjudged to be void, to have a tax sale certificate cancelled and to obtain appropriate ancillary relief by injunction.

If it be conceded that the allegations of the bill of complaint show such an illegal assessment as to make the tax sale certificate an incipient cloud upon the complainant's title, the statute authorizes the complainant to redeem its lands from the certificate at any time "before a tax deed is issued therefor, by paying * the face of the certificate of sale, or such portion thereof as the part or interest redeemed shall bear to the whole," etc., the amount being the unpaid taxes on the land redeemed for the given year with interest, etc. Sec. 570, Gen. Stats. 1906.

An exhibit made a part of the bill of complaint shows a plot of land marked "William Garvin," "Patented March 1, 1881." This plot as shown contains four irregular sections in two different ranges and explains the assessment as made. Sec. 518, Gen. Stats. 1906.

The plot is one body of land partly in Township 20 S., Range 34 East, and partly in Township 20 S., Range 35 East. In the plot are four irregular sections. One is an irregular section in Township 20 S., Range 34 E., numbered 37, and containing 757.81 acres. Another irregular section in the plot south of said Section 37 is in Township 20 S., R. 34 E., and is numbered 40 and contains 413.62 acres. The plot also contains an irregular section in Township 20 S., R. 35 East, numbered 37 and containing 538.35 acres. Another irregular section in the plot south of said last mentioned Section 37 is in Township 20 S., Range 35 E., and is numbered 41, containing 285 acres.

A line runs through the plot between the irregular Section 37, in Range 34, and the irregular Section 37, in Range 35, on the north, and said irregular Section 40, in Range 34, and said irregular Section 41, in Range 35, on the south of the said line. The entire plot or grant contains 1994.78 acres.

The assessment is of the south half of the "grant," "1,000 acres." This description and acreage covers the complainant's two irregular sections, containing 698.62 acres, as well as some portions of the irregular sections north of it. Section 40, Township 20 S., R. 34 E., and Section 41, T. 20 S., R. 35 E., owned by the complainant, are included in the assessment as made; and, under the statute, the owner may redeem the portion of the certificate covering its land. Sec. 570 *et seq.*, Gen. Stats. 1906.

Manifestly it is the duty of the complainant to pay the taxes on its land; and if it does not do so, and applies to equity to cancel a tax sale certificate on the ground of a misdescription of the property, etc., in the assess-

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ment, it should at least offer to do equity by redeeming its lands from the certificate as authorized by the statute by paying the amount of taxes due by it, but paid by the defendant in purchasing the tax sale certificate. It is not alleged that the taxes covered by the tax certificate were not due on the land. *Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. Rep. 406; *Connors v. City of Detroit*, 41 Mich. 128, 1 N. W. Rep. 902; *City of Orlando v. Equitable Building & Loan Ass'n*, 45 Fla. 507, text 516, 33 South. Rep. 986; 10 R. C. L. 419; *Fletcher's Equity*, §91; *Holland v. Hotchkiss*, 162 Cal. 366, 123 Pac. Rep. 258, L. R. A. 1915C 492. Since this redemption can be made as of right under the statute, the remedy at law is adequate and eminently fair; and as the complainant does not offer to do equity, the bill of complaint was properly dismissed.

WEST, J., concurs.

WEST YELLOW PINE COMPANY, *Plaintiff in Error*, v. M.
STEPHENS, *Defendant in Error*.

Opinion Filed July 15, 1920.

1. It is not error for the trial court in a suit for conversion of logs to permit plaintiff over objection of defendant to ask on direct examination as to what the market price of standing timber was at the time of the alleged conversion, and especially where it is shown that the questions and answers immediately following tend to indicate what the value of the logs made from the said standing timber would be at the time of conversion.

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2. Where trees are unlawfully but not wilfully cut, and the cut timber, a chattel, is converted, the measure of recovery in trover is the value of the timber at the time and place of conversion, with interest, and there should be no deductions for labor performed upon the timber anterior to the time that the conversion was consummated by actual removal from owner's land.
3. Where there is a taking of chattels with intent to exercise over them an ownership inconsistent with the real owner's right of possession, there is a conversion.
4. The essential elements of a conversion is a wrongful deprivation of property to the owner; neither manucaption nor asportation is an essential element thereof.

A Writ of Error to the Circuit Court for Madison County; M. F. Horne, Judge.

Judgment affirmed.

R. H. Rowe, for Plaintiff in Error;

Chas. E. Davis, for Defendant in Error.

ANDREWS, Circuit Judge.—M. Stephens, plaintiff in lower court, defendant in error here, sued the West Yellow Pine Company, plaintiff in error here, in two counts:

First, for the wrongful conversion of lumber of the value of three hundred dollars; and

Second, for the wrongful conversion of eight hundred thirty-six sticks of pine timber of the value of three hundred dollars.

The defendant below filed five pleas to the declaration:
First, not guilty;

Second, that the property was not that of plaintiff;

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Third, that the plaintiff was not the owner in possession of the property;

Fourth, that the defendant did not deprive plaintiff of the use and possession of his property; and

Fifth, that no part of the property belonged to plaintiff, nor was he in the use or possession thereof.

Issue was joined on the above pleas, and at the trial the jury were instructed not to find for the plaintiff under the first count, that is for the conversion of the lumber, but to confine their deliberations to the evidence as applicable to the second count, that is for the conversion of logs. The jury found a verdict for the plaintiff; a motion for new trial was denied, and the case is here for review upon writ of error.

The first assignment of error is based upon the overruling of defendant's objection to the following question propounded to plaintiff's witness, Will Bailey: "What was the market price of standing timber at the time per thousand feet?" Objection overruled, and witness answered: "Three dollars and fifty cents." The effect of the ruling thereon will best be shown by stating here the basis for assignments of error 2, 3, 4, and 5, which were also questions to which objections were made and overruled by the court: the second is "Are you in a position to know about what it will cost per thousand feet to cut the timber into logs," Answer, "Yes, sir." Third, "About what would it cost per thousand feet put into lumber at the time?" Answer, "It cost me \$3.50 at that time to manufacture it into lumber." Fourth, "I do not mean to manufacture it into lumber; I meant to cut the timber off of the land and make the trees into logs?" Answer, "About \$2.00 per thousand." Fifth, "What in your opinion would those logs have been worth at the

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time after they were severed from the land; I have reference to per thousand feet?" Answer, "\$3.00 per thousand feet."

It is observed that the third question with reference to what it would cost to manufacture logs into lumber, if error, was cured by the fact that the court charged that no verdict could be found under the first count of the declaration.

Defendant in the court below contended that the first question furnishing the basis for the first assignment of error was error upon the authority of the case of *Skinner v. Pinney*, 19 Fla., 42, where it was held that the offer of the "defendant" to prove the value of standing trees "as a measure of damages" for the conversion was properly rejected, because the action was brought to recover the value of the logs taken away and not for the trespass in cutting them down. And the offer of the defendant to prove the value of the logs at some other place to which he had removed them was properly rejected, because plaintiff was entitled to the value at the time and place of conversion.

It is observed by the questions and answers following the first assignment of error that the evident purpose of asking the first question objected to was to establish the measure of damages in the case, and was one of the preliminary steps in arriving at the measure of damages. For it is seen that the question "What in your opinion would those logs have been worth at the time after they were severed from the land; I have reference to per thousand feet?" together with the answer thereto that "three dollars per thousand," is a method usually followed in arriving at damages under the circumstances of this case. And this would have had the effect of curing

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any error for overruling the objection of the defendant below to the question contained in and furnishing the basis for the first assignment of error.

In fact, under the issues and circumstances of this case, it cannot be presumed that the timber involved would have been worth more standing than when put into logs for removing to the manufacturer, and, therefore, if error at all, it was in favor of the defendant.

It cannot be assumed here, as suggested in brief of plaintiff in error, that the timber was also different in character from that testified about, in fact it is seen that the witnesses had reference to the timber involved in this case when he said "*these* logs would have been worth at that time after they were severed from the land \$3.00 per thousand feet."

Another reason might be mentioned why the question objected to could not be within the rule as quoted above in the case of *Skinner v. Pinney*, *supra*, namely, in that case the *defendant* offered to prove value of standing trees as a measure of damages for conversion of logs, while the *plaintiff* propounded the question in this case, and to show the value when added to the expense of cutting and making the trees into logs; in other words, the stated case does not hold that the *plaintiff* cannot show the value of standing trees, and then add the cost of labor per thousand feet for converting the trees into logs, for the evident purpose of arriving at the value of the logs so converted.

The rule more applicable to the facts in this case is stated in the later case of *Wright & Company v. Skinner*, 34 Fla., 453, 16 South, 338, as follows: "Where the trespassing is an unintentional or mistaken one the damages

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should be the value of the chattels *at the time and place of their conversion*. * * * Where the trespassing is an unintentional or innocently mistaken one, there should not be any deduction in his favor from the value of the property at the time and place of conversion for the cost of any labor bestowed thereon anterior to the time that he completely consummates the conversion by actual removal from the owner's land." In the case at bar the defendant was given the benefit of the above rule while it is shown that, and so alleged in the declaration, that he knowingly converted the logs.

The above was a case wherein the property converted consisted of logs taken from another's land, as is the case here.

The case of *Quitman N. S. Company v. Conway*, 63 Fla. 253, text p. 255; 58 South. 840, following the rule already stated, held that "where trees are unlawfully but not wilfully cut, and the cut timber, a chattel, is converted, the measure of recovery in trover is the value of the timber at the time of conversion, with interest."

There are several assignments based upon portions of charges given by the trial court of its own motion, and are contained in and furnish the basis for assignments of error 7 to 13, inclusive, and the parts of said charges attacked are the portions in which the trial Court instructed that if any of the timber in question was made use of on the land of plaintiff in the construction of a tram-road on the right-of-way across plaintiff's land or for the purpose of building up low places as testified about, then the owner was deprived of the use of the timber and the conversion was complete when the timber was cut and so used in the tram-road.

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There was testimony in line with the charges given above that part of the logs were used in making the tram-road and some that had not rotted or become defective were removed when the tram-road was removed from plaintiff's land.

There was no error in the above charges on the point in question, in fact, practically this same question was settled by this Court against defendant's contention in the case of Quitman N. S. Company v. Conway, *supra*, where the rule is stated that "where there is a taking of chattels with intent to exercise over them an ownership inconsistent with the real owner's right of possession, there is a conversion." Citing 21 Ency. Pl. & Pr. p. 1012; 2 Words & Phrases, 1562; Trustees v. Int. Paper Co., 132 Fed. 92.

The above case further states that "conversion takes place when the trespasser at the place where it lay when the tree is cut or elsewhere assumes dominion over the timber that is inconsistent with the rights of the true owner * * * . This view is not inconsistent with the decision on the facts in the cases of Moody v. Caulk, 14 Fla., 50; Skinner v. Pinney, 19 Fla., 42; Wright v. Skinner, 34 Fla., 453; 16 So. 335; Peacock v. Feaster, 51 Fla., 269; 40 So. 74; Robinson v. Hartridge, 13 Fla. 501."

We think that the authorities are agreed that the essential elements of a conversion is a wrongful deprivation of property to the owner, and neither manucaption nor asportation is an essential element thereof. 38 Cyc. 2008.

Another point which is raised by the fourteenth assignment of error is that the verdict is contrary to the evidence, the law and the charge of the Court, because the amount of damages awarded is excessive.

Holden et al. v. Holden—Decision of Court.

The Court charged the jury that in assessing damages they should allow in addition to the value of the logs at the time of conversion, interest at the rate of 8% per annum from the time of the conversation, and it must be assumed that the amount of damages stated in the verdict includes the interest which was for the term of over three years. There was evidence before the jury that the logs were worth \$3.00 per thousand feet at the time of conversion, and there was evidence that there was such an amount converted, which, when added to the interest would fully authorize the amount found as damages by the jury.

There being no error such as would require reversal, the same is hereby affirmed.

PER CURIAM.—The record in this cause having been considered by this Court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the Court as its opinion, it is considered, ordered and adjudged by the Court that the judgment herein be, and the same is hereby affirmed.

BROWNE, C. J. AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

CHARLES B. HOLDEN AND C. A. LYTLE, *Appellants*, v.
HULDAH HOLDEN, *Appellee*.

Decision Filed July 15, 1920.

An Appeal from a decree of the Circuit Court within and for the County of Palm Beach; E. B. Donnell, Judge.

Higginbotham v. State of Florida—Syllabus.

M. D. Carmichael and A. C. Adams, for Appellants;

Metcalf & Blackwell, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

BASS HIGGINBOTHAM, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed July 15, 1920.

Upon an indictment charging the larceny of "one bull, one steer, one cow," where a conviction of the larceny of "one bull" is reversed because the verdict was not supported by the evidence, and on another trial that is expressly confined to the larceny of "one bull," a conviction of the larceny of "one bull" will be sustained on writ of error where there is ample evidence to support the verdict, no errors of law or procedure appearing.

A writ of error to the Circuit Court for DeSoto County;
Geo. W. Whitehurst, Judge.

Higginbotham v. State of Florida—Opinion of Court.

• Judgment affirmed.

W. D. Bell, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WHITFIELD, J.—Upon an indictment for the larceny of “one bull, one steer, one cow, of the property of Richard Windham, the plaintiff in error was convicted of the “larceny of one bull.” This conviction was reversed because the evidence related to a “cow” or to an “animal” as being the subject of the larceny charged thus showing the verdict to be not supported by the evidence adduced at the trial. *Higginbotham v. State*, 78 Fla. 114, 82 South. Rep. 601.

On another trial on the same indictment the defendant was found “guilty” and to a judgment of conviction on the verdict took writ of error.

A contention, sought to be presented by plea, that at the former trial the defendant by being found guilty of the larceny of a bull was in law acquitted of the charge of larceny of a cow and of a steer and that the reversal of the conviction of larceny of a bull entitled the defendant to a discharge under the indictment, was manifestly unavailing if it had been so presented as to require consideration of the plea. In the charge the jury were instructed as to the acquittal on the charge of larceny of a cow and a steer, and their consideration was expressly confined to the charge of the larceny of “one bull.” No special instructions were requested and the charges given were comprehensive and not in any way prejudicial to the defendant.

Judy et al. v. Schrader & Co.—Decision of Court.

As there is ample evidence to sustain the verdict under the indictment charging larceny of "one bull," and as no material errors of law or of procedure appear, the judgment is affirmed.

BROWNE, C. J. AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

G. W. JUDY AND A. J. KNIGHT, LATE CO-PARTNERS, DOING
BUSINESS AS G. W. JUDY & Co., *Plaintiffs in Error*, v.
H. C. SCHRADER & Co., A CORPORATION, *Defendant in Er-
ror*.

Decision Filed July 17, 1920.

Writ of Error to a Judgment of the Circuit Court With-
in and for the County of Orange; C. O. Andrews, Judge.

J. T. Watson, for Plaintiffs in Error.

Davis & Giles, for Defendant in Error.

PER CURIAM.—This cause having heretofore been sub-
mitted to the Court upon the transcript of the record of
the Judgment aforesaid, and argument of counsel for the
respective parties, and the record having been seen and
inspected, and the Court being now advised of its judg-
ment to be given in the premises, it seems to the Court
that there is no error in the said Judgment; it is, there-
fore, considered, ordered and adjudged by the Court that
the said Judgment of the Circuit Court be, and the same
is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Steffanos v. State of Florida—Syllabus.

WILLIAM STEFFANOS, *Plaintiff in Error*, v. THE STATE OF
FLORIDA, *Defendant in Error*.

Opinion Filed July 20, 1920.

1. An information charging a male person with having carnal intercourse with an unmarried female of previous chaste character who at the time of such intercourse was under the age of eighteen years, and such offense is alleged to have been committed at a time subsequent to the passage of Chapter 7732, Laws of Florida, 1918, is not bad because it omits the word "unlawful" just preceding the words "carnal intercourse."
2. An information should not be quashed on account of any defects in form unless it is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.
3. In the prosecution of a male person under Chapter 7732, Laws of Florida, 1918, for having unlawful carnal intercourse with an unmarried female person of previous chaste character who at the time of such intercourse was under the age of eighteen years, evidence of acts of unchastity on the part of such female committed prior to the date of the alleged offense is material and should not be excluded.
4. In a criminal prosecution where the parties have announced that there is no more evidence to be introduced upon either side, it is reversible error for the court to prohibit the defendant from offering additional evidence material to his defense when this offer is made in good faith, and there is no evidence of dilatoriness or negligence on the part of the defense in not offering it earlier, and the arguments of counsel have not been made, and the cause not submitted to the jury under the court's charge.

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5. In a criminal prosecution counsel for the State should make no comment upon the defendant's failure to testify when such is the case.

A Writ of Error to the Criminal Court of Record for Dade County; J. Emmet Wolfe, Judge.

Judgment reversed.

Gautier & Riley, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

ELLIS, J.—The plaintiff in error was informed against in the Criminal Court of Record for Dade County upon the charge of having carnal intercourse with an unmarried female of previous chaste character who was at the time of such intercourse under the age of eighteen years, "contrary to the form of the statute in such case made and provided." The plaintiff in error was convicted and sentenced to hard labor in the State prison, and seeks a reversal of the judgment on writ of error.

Motions to quash the information and in arrest of judgment were made and denied, and such rulings constitute the basis of the first and second assignments of error.

It is contended that the information which follows the language of the Acts of 1915, Chapter 6974, amending Section 3521, General Statutes, 1906, instead of the language of the Act of 1918, Chapter 7732, which repealed the former Acts upon the subject, should have been quashed or the judgment arrested because the offense was alleged to have been committed after the passage of the Act of 1918.

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In the case of *Shields v. State*, 78 Fla. 524, 83 South. Rep. 391, the indictment was drawn under the Act of 1918, Chapter 7732, and alleged the offense to have been committed in July, 1918, or before the passage of the latter Act. Section 3521, General Statutes, 1906, was then in force because Chapter 6974, Acts of 1915, which undertook to amend the section of the General Statutes, was invalid in that the subject of the Act was not expressed in the title as required by Section 16, Article III, of the Constitution. Now Section 3521, General Statutes, is materially different in terms from the Act of 1918, Chapter 7732, in that the former denounced as a felony the act of having carnal intercourse with an unmarried female under the age of eighteen years, while the Act of 1918, Chapter 7732, adds the further qualification of previous chaste character in the description of the female with whom it shall be a felony for a male person to have carnal intercourse.

In the *Shields* case the judgment was reversed because the indictment was expressly and in terms predicated upon a statute which was enacted after the offense charged was alleged to have been committed.

If the indictment in the *Shields* case had been based upon Section 3521, General Statutes, a different case would have been presented.

Now the Act of 1915, Chapter 6974, which is deemed to be void because of a defective title, omits the word "unlawful" in denouncing the offense of carnal intercourse with any unmarried female of previous chaste character, while the language of the Act of 1918, Chapter 7732, is as follows: "Any male person who has *unlawful* carnal intercourse with any unmarried female person of previous chaste character," etc.

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The information in this case omits the word "*unlawful*" in charging the defendant with the act of having "carnal intercourse" with the unmarried "female" of previous chaste character who at the time of such intercourse was under the age of eighteen years. The word "person" is also omitted, but is contained in the Act of 1918 after the word "female," and omitted from the Act of 1915, and not the language *ipsissimis verbis* of the Act of 1918.

As the crime was alleged to have been committed after the passage of the Act of 1918, the information should have been drawn under that Act. But the question is, does the omission of the words "unlawful" and "person" from the information vitiate it as a pleading under the Act of 1918. We think that such omission of the quoted words does not render the information bad, because the information was not so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. Sec. 3962, General Statutes of Florida, 1906, Compiled Laws, 1914.

The omission of the word "person" after the word "female" could of course have no possible embarrassing effect upon the defendant in the preparation of his defense, because the language of the information clearly showed that the "female" upon whom the offense was alleged to have been committed was a rational being and not a beast.

The omission of the word unlawful was harmless because any carnal intercourse between unmarried persons, or persons unmarried to each other even with the female's consent is unlawful. So the information was cor-

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rectly drawn and the two first assignments of error fail.

The third assignment of error is based upon the order overruling the motion for a new trial. The tenth ground of the motion attacks the ruling of the Court denying to defendant the right to produce witnesses to show "acts of unchastity" on the part of the prosecutrix prior to April 30, 1919, the date upon which the defendant is alleged to have had carnal intercourse with her. This ruling occurred Monday morning when the court convened. Saturday night each party announced that it had no further evidence to introduce. Monday upon the convening of court the defendant moved the court to be permitted to call witnesses to establish the previous unchaste character of the prosecutrix. This motion was denied upon the ground that the defendant had announced the Saturday night before that he had no further testimony to introduce. This ruling was harmful error. The evidence offered was most material, going to the very gist of the offense. If the testimony offered was of such character that the jury might have believed it, the innocence of the defendant would have been established. The evidence offered was a denial of a most material element of the offense charged and was of such character as to strengthen the evidence previously introduced of a circumstantial nature denying the previous chaste character of the prosecutrix.

To preclude one from introducing evidence so material to his defense and persuasive perhaps of his innocence, merely because he had said that he had no more testimony to offer, is to enforce a rule of procedure almost to the point of a denial of justice. It is to sacrifice liberty to a mere form of procedure of court room usage the

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observance of which is to bring about the orderly introduction of evidence by the respective parties. But such rules ought not to be applied with such technical precision and unbending rigor as to produce injustice. See 38 Cyc. 1353. They should be enforced or relaxed in the furtherance of justice. The motion was to reopen the case, but the case was not technically closed. The judge had not charged the jury, the counsel had not begun the argument, the case had not been submitted. It had only reached that stage where each party announced that it rested, that there was no more evidence to be introduced. The court then took a recess. Upon convening on Monday following the motion was made. Whatever delay or confusion may have resulted in the trial of the case by permitting the witnesses to testify might have been fully requited by the establishment of defendant's innocence, for it was the province of the jury to weigh the evidence introduced and place a value upon its probative force.

Even if the case had been technically closed it would have been an abuse of discretion to refuse to open the case and permit the evidence to be introduced upon the proper showing being made as to why it had been previously omitted. See 38 Cyc. 1361.

While the record does not disclose that any showing was made when the motion was submitted, yet the cause had not proceeded so far that the ends of justice would have been defeated or the orderly processes of the court disturbed by an admission of the testimony.

The refusal to allow the evidence to be introduced under the circumstances was an abuse of discretion which was harmful to the defendant and was therefore error.

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During the argument of counsel the prosecuting attorney commented upon the failure of the accused to testify in his behalf. Exception was taken to the remarks of counsel by the defendant and the court corrected the prosecuting attorney and instructed the jury to disregard the statement, but he did so in such words as to render the correction of little value to the defendant. While we do not hold the transaction as it appears to have occurred reversible error, we think that when prosecuting attorneys do violate the plain language of the statute their remarks should be expunged so far as possible, and removed from consideration by the jury.

For the error pointed out the judgment is hereby reversed.

BROWNE, C. J., AND TAYLOR, J., concur.

WHITFIELD AND WEST, J. J., dissent.

THURMAN H. SMITH, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed July 20, 1920.

1. The term "dwelling house" in the law of burglary is defined as the apartment, building or cluster of buildings in which a man with his family resides.
2. Words employed in a statute having acquired a fixed and definite meaning, it will be presumed, in the absence of any definition in the statute, that they were intended to be used in that sense by the Legislature.

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3. In order to uphold a conviction under the statute defining the offense and prescribing the penalty for breaking and entering a dwelling house, it must be alleged and proved that the dwelling house alleged to have been broken and entered was the dwelling house in fact of another at the time of the alleged breaking and entry.
4. In order that a house may come within the common law definition of burglary it must be in fact the dwelling house of another at the time of the breaking and entry; and the same is true under a statute punishing the breaking and entering of a dwelling house. The character of the house is generally immaterial if it is occupied as a dwelling.
5. Temporary absence of the occupant does not take away from a dwelling house its character as such, but it must be made to appear that such occupant left the house *animo revertendi* in order to constitute an unlawful breaking and entry of the house during such absence burglary.

A Writ of Error to Circuit Court of DeSoto County;
Geo. W. Whitehurst, Judge.

Judgment reversed.

W. D. Bell, for Plaintiff in Error;

Van C. Swearingen, Attorney General and Worth W.
Trammel, Assistant, for the State.

WEST, J.—The plaintiff in error, hereafter referred to as the defendant, was indicted in the Circuit Court for DeSoto County on a charge of breaking and entering a dwelling house with intent to commit a felony, to-wit, grand larceny. Upon a trial of the case there was a verdict of guilty as charged. Motion for a new trial was made and denied. By the sentence imposed the defendant

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was required to serve a term of one year at hard labor in the state prison. Writ of error was taken from this court to the judgment of the court below imposing this sentence.

The prosecution is under Section 3281, General Statutes of 1906, Compiled Laws, 1914, denouncing the offense and prescribing the penalty for breaking and entering a dwelling house.

The term "dwelling house" in the law of burglary is defined in Bishop's Statutory Crimes (3 ed.) §278, as "the apartment, building or cluster of buildings in which a man with his family resides." In Wharton's Criminal Law, §993, it is said: "The breaking and entry, to constitute a burglary, must be ordinarily into the dwelling house of another; that is to say, a house in which the occupier and his family usually reside, or, in other words, dwell and lie in."

Having obtained a fixed and definite meaning, it will be presumed, in the absence of any definition in the statute, that words employed were intended to be used in that sense by the Legislature. Accordingly, in order to uphold a conviction under the statute it must be shown that the dwelling house alleged to have been broken and entered was the dwelling house in fact of another at the time of the alleged breaking and entry. 6 Cyc. 185; *ex parte Vincent*, a Slave, 26 Ala. 145, 62 Am. Dec. 714; *State v. Clark*, 89 Mo. 423, 1 S. W. Rep. 332; *Schwabacher v. People*, 165 Ill. 618, 46 N. E. Rep. 809.

In 6 Cyc. 185 on this subject it is said: "In order that a house may come within the common-law definition of burglary it must be in fact the dwelling-house of another

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at the time of the breaking and entry; and the same is true under a statute punishing the breaking and entering of a dwelling-house. The character of the house is generally immaterial if it is occupied as a dwelling. The house must be occupied as a dwelling-house, and not merely be suitable or intended for such purpose. The owner or occupant, or some member of his family, or a servant, must sleep there. If it is so occupied the temporary absence of the occupant will not prevent it from being the subject of burglary as a dwelling-house; but a house, although furnished as a dwelling-house, loses its character as such for the purpose of burglary if the occupant leaves it without the intention to return. Occasionally sleeping in a house is not enough to make it a dwelling-house. In some States, by statute, dwelling-houses are the subject of burglary, and may be described as such, whether they are occupied or not."

Temporary absence of the occupant does not take away from a dwelling-house its character as such, but it must be made to appear that such occupant left the house *animo revertendi* in order to constitute an unlawful breaking and entry of the house during such absence burglary. 4 R. C. L. 426-7; 2 East's P. C. 496; Handy v. State, 46 Tex. Crim. Rep. 406, 80 S. W. Rep. 526; State v. Mason et al, 74 Oh. St. 65, 77 N. E. Rep. 283; Harrison v. State, 74 Ga. 801; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109.

From the evidence in this case it appears that the house alleged to have been broken and entered by defendant was unoccupied at the time of the alleged breaking and entry. Formerly it had been occupied as a dwelling house by the owner, who resided in it with his family. Some nine months prior to the alleged breaking

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and entry the owner had vacated the house and moved with his family into another building. During this period the house remained unoccupied, but some of the household effects of the owner and his family were left in it and remained there. There is, however, no evidence in the record to the effect that the owner intended to return and again occupy the alleged dwelling house as a dwelling house in fact. In other words, there is no evidence in the record to the effect that the absence of the occupant was temporary. We are not permitted to infer that this was the case, and since it appears that the alleged dwelling house had been vacant for a period of nine months, in the absence of any proof that the occupant intended to return and re-establish his residence therein, there is a failure in the evidence to prove the essential allegation of the indictment, that the house alleged to have been broken and entered by defendant was a dwelling house.

The judgment must therefore be reversed and the case remanded for a new trial.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

CITIZENS AND PEOPLES NATIONAL BANK, A CORPORATION,
Plaintiff in Error, v. LOUISVILLE AND NASHVILLE RAIL-
ROAD COMPANY, A CORPORATION, *Defendant in Error*.

Opinion Filed July 20, 1920.

1. Where it cannot be fairly said that on the evidence adduced there can be but one opinion among jurors as reasonable men on the issue presented, or that "no sufficient evidence has

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been submitted upon which the jury could legally find a verdict for" the defendant, a verdict should not be directed for the plaintiff.

2. A verdict for one party may be directed only when the evidence adduced is legally insufficient to support a judgment for the opposing party, otherwise the organic "right of trial by jury" would be violated.
3. Where there is substantial evidence to sustain a judgment for one party a verdict for the other party should not be directed, even though a verdict found may properly be set aside for a new trial where other matters of procedure or of law taken in connection with the evidence make a new trial appropriate in order that "right and justice shall be administered," as required by the Constitution.

A Writ of Error to the Circuit Court for Escambia County; A. G. Campbell, Judge.

Judgment reversed.

Watson & Pasco, for Plaintiff in Error;

Blount & Blount & Carter, for Defendant in Error.

PER CURIAM.—To a declaration in trover alleging that the bank paid to one W. W. Weekly the amount of a check belonging to the Railroad Company upon an unauthorized endorsement by Weekly, a demurrer was sustained. A judgment for the defendant bank on the demurrer was reversed. *Louisville & N. R. Co. v. Citizens' & Peoples' Nat. Bank of Pensacola*, 74 Fla. 385, 77 South. Rep. 104.

At a subsequent trial the defendant bank pleaded "that it is not true as alleged * that W. W. Weekly was not authorized by plaintiff to endorse or collect the said

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check;" and "that it is not true as alleged * that said Weekly did not pay over to the plaintiff the money alleged to have been collected by him on the said check."

The court instructed the jury that "in this cause it appears to the court that the bank cashed the check as alleged in the declaration, upon an endorsement which was unauthorized, it not appearing that the railroad had at any time authorized its agent to make such endorsements and collect the cash, and it not appearing that it ever had any prior knowledge that he had done so; therefore, the bank's paying this check to W. W. Weekly, upon such endorsement, was unauthorized, and therefore your verdict will be for the plaintiff for \$905.00, with interest from the date of payment of the check."

A verdict was so returned, and to a judgment rendered thereon the defendant bank took writ of error. It is conceded by counsel for the defendant in error that under the first plea express authority or implied authority of Weekly to endorse the check or estoppel to deny Weekly's authority may be shown. There is evidence tending to show that a course of dealing of long standing indicated that Weekly did have or did exercise authority that apparently warranted the defendant in accepting his endorsement of the check in question as being authorized by the plaintiff railroad company, and some proffered testimony along this line was excluded by the court upon objection.

It cannot be fairly said that on the evidence adduced there can be but one opinion among jurors as reasonable men on the issue presented, or that "no sufficient evidence has been submitted upon which the jury could legally find a verdict for" the defendant. Sec. 1, Chap.

Albritton v. King Lumber Co.—Decision of Court.

6220, Acts 1911, amending Sec. 1496, Gen. Stats. 1906, Comp. Laws, 1914; Gravette v. Turner, 77 Fla. 311, 81 South. Rep. 476.

A verdict for one party may be directed only when the evidence adduced is legally insufficient to support a judgment for the opposing party, otherwise the organic "right of trial by jury" would be violated. And where there is substantial evidence to sustain a judgment for one party a verdict for the other party should not be directed, even though a verdict found may properly be set aside for a new trial where other matters of procedure or of law taken in connection with the evidence make a new trial appropriate in order that "right and justice shall be administered," as required by the Constitution.

Judgment reversed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

W. J. ALBRITTON, *Plaintiff in Error*, v. KING LUMBER COMPANY, *Defendant in Error*.

Decision Filed July 21, 1920.

A Writ of Error to the Circuit Court for DeSoto County; George W. Whitehurst, Judge.

Wilson & Boswell, for Plaintiff in Error;

Treadwell & Treadwell, for Defendant in Error.

Busbee v. Weeks et al.—Syllabus.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

ANDREW BUSBEE, *Plaintiff in Error*, v. EMILINE WEEKS,
et al., *Defendants in Error*.

Opinion Filed July 21, 1920.

1. At common law the father has a paramount right to the custody and control of his legitimate minor children, subject only to lawful regulations for the benefit of his children.
2. Where an infant girl's mother died at its birth and when the child was three days old its father verbally committed its care and custody to its maternal grand parents until the father could otherwise provide for its proper care, and when the child is about four years old, the father, who, with his other children, live with his parents, is entitled to the custody of the infant girl, particularly when all of the home conditions of the maternal grand parents are not so desirable and the father's home with his parents is

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a proper place for the child's welfare, even though the personal attentions of the maternal grand parents to the infant girl are in every way commendable.

A writ of error to the Circuit Court for Walton County;
A. G. Campbell, Judge.

Reversed.

Walter Kehoe, for Plaintiff in Error;

No appearance for Defendants in Error.

WHITFIELD, J.—The writ of error herein was under the statute allowed and taken to an order awarding the care and custody of Irene Busbee, an infant female child about four years of age, to its maternal grand parents with privileges to the child's father to have her "in his home two days and nights in succession, once in every two weeks during the time this order is in force," the order providing further that the father "and his children, brothers and sister of the said Irene Busbee, be permitted at all reasonable times to visit the said Irene in the home of the" grandparents; and that the grand parents "teach the said Irene Busbee to recognize Andrew Busbee as its father, and also to love, honor and respect him as her father, and also to love its brothers and sister who are now with the petitioner," the father of Irene.

It appears that Irene's mother died at Irene's birth; and that when three days old Irene was by her father committed to the care of her maternal grand parents until he could otherwise provide for her proper care. The father and his three older children now live with his parents and the father is able to properly care for Irene

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with the assistance of his parents. The evidence indicates that the present home of the father is a proper place for the child and that the conditions at the home of the child's maternal grand parents is not so desirable, though such grand parents are attached to Irene.

The provisions of the order have regard for family considerations; but they do not accord to the father all the rights he is entitled to under the law as it exists in this State.

At common law the father has the paramount right to the custody and control of his legitimate minor children, subject only to lawful regulations for the benefit of the children. *Porter v. Porter*, 60 Fla. 407, 53 South. Rep. 546; *Hernandez v. Thomas*, 50 Fla. 522, 39 South. Rep. 641; *Miller v. Miller*, 38 Fla. 227, 20 South. Rep. 989.

In this case the legal rights of the father not having been relinquished or forfeited, and his ability to take proper care of the child appearing, the custody should be awarded to him on the showing made.

Reversed.

BROWNE, C. J. AND TAYLOR AND ELLIS, J. J., concur.

WEST, J., dissents.

WEST, J., dissenting.—Other things being equal, the right of the father to the custody of his minor child is paramount, but this right may be qualified by considerations for the benefit and welfare of the minor child. In this case the infant, a girl child four years old, three days after her birth and upon the death of her mother, was

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committed to the care of her maternal grandmother. She is in the home in which her mother was reared. Strong ties of affection and attachment for her have naturally been formed by those who have reared her. In my view the condition of the infant would not be benefitted by transferring her to the custody of her father where he and his three other children reside with his parents. On the contrary, I think that the infant's welfare will be better subserved by leaving her for the present where she may have the nurture and care of the one who in her life occupies the position of mother.

The order appealed from is "until the further order of this court, or some other court of competent jurisdiction." It accords the father the rights which he possesses as father of the child, but recognizes and gives effect to the rule that the welfare of the infant is a cardinal consideration in such cases. *Robertson v. Bass*, 52 Fla. 420, 42 South. Rep. 242, and cases cited in the opinion.

It may be that at some future time it will be proper to award the custody of the child to her father, but under the circumstances of this case I am unable to concur in the view which holds the order of the Circuit Judge reversible error.

Our Home Life Ins. Co. v. Blanton et al.—Decision of Court.

OUR HOME LIFE INSURANCE COMPANY, A CORPORATION,
Appellant, v. JAMES M. BLANTON AND FLORISSA
A. BLANTON, *Appellees*.

Decision Filed July 21, 1920.

An Appeal from a Decree of the Circuit Court within
and for the County of Pinellas; O. K. Reaves, Judge.

John U. Bird and Chas. S. Adams, for Appellant;

Herbert M. Blanton and Don C. McMullen, for Appel-
lant.

PER CURIAM.—This cause having heretofore been sub-
mitted to the Court upon the transcript of the record of
the decree aforesaid, and argument of counsel for the
respective parties, and the record having been seen and
inspected, and the Court being now advised of its judg-
ment to be given in the premises; it seems to the Court
that there is no error in the said decree; it is, therefore,
considered, ordered and adjudged by the Court that the
said decree of the Circuit Court be, and the same is
hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

State ex rel. Swearingen v. Puckett et al.—Opinion of Court.

STATE *ex rel.* VAN C. SWEARINGEN, ATTORNEY GENERAL,
Plaintiff in Error, v. THOMAS B. PUCKETT, *et al*, AS THE
BOARD OF COUNTY COMMISSIONERS OF TAYLOR COUNTY,
FLORIDA, *Defendants in Error*.

Opinion Filed July 22, 1920.

A Writ of Error to the Circuit Court for Taylor County; M. F. Horne, Judge.

Van C. Swearingen, Attorney General, and *Chas. E. Davis*, for Plaintiff in Error;

W. B. Davis, for Defendants in Error.

PER CURIAM.—An alternative writ of mandamus alleges arbitrary and unauthorized action of the County Commissioners in ordering reductions to be made in the assessed valuations of practically all of the property in the county, and that because the Tax Assessor refused to comply with such illegal action, the County Commissioners refuse to approve and certify to the tax books. The writ then in effect commanded the County Commissioners to proceed with their duties with reference to the authentication of the tax books.

The alternative writ was dismissed on demurrer. Writ of error was taken.

While the command of the alternative writ may not be correctly framed, it may be amended, or if the allegations of the alternative writ are not controverted an appropriate peremptory writ may be awarded.

Reversed for appropriate proceedings.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

ELLIS, J., dissents.

F. E. C. Ry. Co. v. City of Miami et al.—Decision of Court.

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION,
Appellant, v. CITY OF MIAMI, A MUNICIPAL CORPORATION,
AND W. B. MOORE, AS CITY CLERK OF THE CITY OF MIAMI,
Appellees.

Opinion Filed July 26, 1920.

An Appeal from the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Brown, Twyman & Scott and *Scott M. Loftin*, for Appellant;

S. P. Robineau, for Appellees.

PER CURIAM.—Proceedings brought to enjoin the enforcement of special assessments for a storm sewer were dismissed on demurrer. As the allegations of the bill of complaint are a sufficient basis for evidence upon the fundamental question of whether complainant's specified property is or could be at all benefited by the construction of the storm sewer, the bill is not without equity and should not have been dismissed on demurrer.

Reversed for further proceedings.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Baker v. Director-General of R. R.—Decision of Court.

JOHN Q. BAKER, *Plaintiff in Error*, v. DIRECTOR-GENERAL
OF RAILROADS, *Defendant in Error*.

Decision Filed July 27, 1920.

Writ of Error to a Judgment of the Circuit Court Within and for the County of Dade; H. Pierre Branning, Judge.

G. A. Worley & Son and R. H. Seymour, for Plaintiff in Error.

Scott M. Lofton, Robert H. Anderson and Armstead Brown, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Rosenthal v. Black—Decision of Court.

HENRY ROSENTHAL, *Plaintiff in Error*, v. W. C. BLACK,
Defendant in Error.

Decision Filed July 27, 1920.

Writ of Error to a Judgment of the Circuit Court Within and for the County of Hillsborough; F. M. Robles, Judge.

Howard P. Macfarlane, N. B. K. Pettingill and M. B. Withers, for Plaintiff in Error;

McKay & Withers, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

State ex rel. Martin v. B. of C. Com.—Opinion of Court.

THE STATE OF FLORIDA *ex rel.* E. P. MARTIN, *Plaintiff in Error*, v. BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY, FLORIDA, *Defendant in Error*.

Opinion Filed July 27, 1920.

Mandamus proceedings in the Circuit Court may be reviewed by the Supreme Court on a writ of error, but not on an appeal.

An Appeal from the Circuit Court of Hillsborough County; F. M. Robles, Judge.

Appeal dismissed.

A. T. Stuart, for Plaintiff in Error;

Mabry & Carlton, for Defendant in Error.

PER CURIAM.—An *appeal* was taken from an order dismissing an alternative writ of mandamus.

The statute provides that "all proceedings to procure review by an appellate court of the proceedings of a lower court in cases at law shall be by writ of error, except in cases where certiorari or prohibition shall lie, or where it shall be otherwise expressly provided." Sec. 1690 Gen. Stats. 1906, Compiled Laws, 1914.

Mandamus is a proceeding at law, and there is no express provision that a review thereof by an appellate court may be had except by writ of error, or perhaps in exceptional cases by certiorari.

The entry of an *appeal* is not authorized by law and does not give the appellate court jurisdiction of the subject matter in mandamus proceedings, though the oppos-

Calhoun v. S. A. L. Ry. Co.—Decision of Court.

ing parties have appeared; and as it does not appear that a writ of error was duly issued in the cause, the appeal and the cause are dismissed.

BROWNE, C. J. AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

A. L. CALHOUN, *Plaintiff in Error*, v. SEABOARD AIR LINE RAILWAY COMPANY, A CORPORATION, *Defendant in Error*.

Decision Filed July 28, 1920.

Writ of Error to a Judgment of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

Glazier & Tervin, for Plaintiff in Error;

Knight, Thompson & Turner, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that

Middleton et al. v. Frank—Decision of Court.

the said judgment of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

FRONA E. MIDDLETON AND H. M. MIDDLETON, HER HUSBAND,
Appellants, v. ASHER FRANK, *Appellee*.

Decision Filed July 28, 1920.

An Appeal from a Decree of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

S. S. Sanford, for Appellants;

Hilton S. Hampton, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises; it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be. and the same is hereby affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Hanson v. Harrsen—Decision of Court.

WILLIAM STANLEY HANSON, *Appellant*, v. HARRO HARRSEN, *Appellee*.

Decision Filed July 28, 1920.

An Appeal from orders of the Circuit Court within and for the County of Lee; George W. Whitehurst, Judge.

R. W. Randell, for Appellant;

Alderman & Henderson, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the orders aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said orders; it is, therefore, considered, ordered and adjudged by the Court that the said orders of the Circuit Court be, and the same are hereby affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Reid et al. v. F. and W. I. T. Co.—Decision of Court.

H. M. REID AND W. L. KOON, *Plaintiffs in Error*, v. FLORIDA AND WEST INDIAN TRANSPORTATION COMPANY, A CORPORATION, *Defendant in Error*.

Decision Filed July 28, 1920.

A writ of error to a judgment of the Circuit Court within and for the County of Lee; John S. Edwards, Judge.

John W. Burton and Leitner & Leitner, for Plaintiff in Error;

McKay & Withers and Frank C. Alderman, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises; it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Giddens, et al. v. State of Florida—Decision of Court.

WILL GIDDENS AND SHERMAN PENTON, *Plaintiffs in Error*,
v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed July 28, 1920.

A Writ of Error to the Circuit Court for Santa Rosa County; A. G. Campbell, Judge.

W. W. Clark, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant, for the State.

PER CURIAM.—On writ of error from a conviction of larceny of a steer, it is argued that the trial court erred in denying a motion for a continuance and in not granting a motion for new trial. No abuse of discretion or harmful error appears in denying a continuance, and as there is evidence legally sufficient to sustain the verdict and no harmful or material errors of law or of procedure appearing, the judgment is affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Mitchell v. Harper et al.—Syllabus.

R. T. MITCHELL, *Appellant*, v. J. T. HARPER AND J. A. HOLLY, CO-PARTNERS DOING BUSINESS AS SEMINOLE AUTO COMPANY, *Appellees*.

Opinion Filed July 29, 1920.

1. A valid agreement extending the time for the payment of an obligation has the effect of suspending the right to enforce payment during the period of such extension.
2. In order to be effectual an agreement extending the time for the payment of an obligation must be supported by a sufficient consideration. A mere agreement for delay for no definite time and without consideration is not binding.

An Appeal from the Circuit Court for Dade County;
H. Pierre Brauning, Judge.

Decree affirmed.

Thompson & Hampton, for Appellant;

McCaskill & McCaskill, for Appellees.

WEST, J.—In a suit to foreclose a mortgage upon personal property there was a final decree for complainants and defendant appeals.

The principal defense was that an extension of time had been given for the payment of the indebtedness which the mortgage was given to secure and that the foreclosure suit was therefore prematurely brought.

The paragraph of the answer in which this defense is attempted to be set up is as follows: "That on or about the 25th day of January, 1918, he came to the office of

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complainant's, in the City of Miami, Florida, at their request, to arrange about the notes, and the mortgage, the notes which are set-up in the bill of complaint as a basis of the cause of action, and that thereupon the complainants, T. J. Harper and J. A. Holly, did promise, and agree with this defendant that they would extend the time of payment of said mortgage indebtedness until after he could plant and harvest his tomato crop for the spring, 1918. Yet this defendant charges that disregarding their promise and agreement in this regard, and without further notice to him, or demand for payment, they instituted this foreclosure suit on, to-wit: the — day of February, 1918, and while the defendant was planting his tomatoes out."

The proof of the alleged extension of time for payment of the notes contains no more than the answer. It amounts to nothing except to show that no enforceable agreement for extension of time was made.

A valid agreement of extension has the effect of suspending the right of the owner of the indebtedness to enforce its payment during the period of such extension. But in order to be effectual such agreement must be supported by a sufficient consideration. A mere agreement for delay for no definite time and without consideration is not enforceable. 7 Cyc. 731; 27 Cyc. 1525; *Friedenberg v. Robinson*, 14 Fla. 130; *Davis et al v. Stout*, 126 Ind. 12, 25 N. E. Rep. 862; *Marshall Field Co. v. Oren Ruffcorn*, 117 Ia. 157, 90 N. W. Rep. 618; *Howe v. Klein*, 89 Me. 376, 36 Atl. Rep. 620; *Olmstead v. Latimer et al*, 158 N. Y. 313, 53 N. E. Rep. 5.

No consideration for the alleged extension was either averred or proved and the contention that the agreement

Frazier et al. v. Geo.-Eng. Co.—Decision of Court.

to this effect was binding upon complainants necessarily fails.

Two other assignments of error are argued, but they do not present matters requiring discussion. No error is made to appear by either of them.

The decree appealed from is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.
concur.

J. W. FRAZIER AND NELLIE C. FRAZIER, HIS WIFE, *Appellants*, v. GEORGIA-ENGINEERING COMPANY, A CORPORATION, *Appellee*.

Decision Filed July 29, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

Howard P. Macfarlane, for Appellants;

Gibbons & Gibbons, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Order aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the

Hancock v. Gregg—Decision of Court.

said order of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

ELLIS, J. dissents.

BROWNE, C. J., not participating.

J. C. HANCOCK, *Appellant*, v. JAMES F. GREGG, AS TAX
COLLECTOR FOR THE TOWN OF STUART, *Appellee*.

Decision Filed July 29, 1920.

An Appeal from an Order of the Circuit Court Within
and for the County of Palm Beach; E. B. Donnell,
Judge.

Metcoalf & Blackwell, for Appellant;

C. C. & C. E. Chillingworth, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Order aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Order; it is, therefore, considered, ordered and adjudged by the Court that the said

Smitherman v. Smitherman—Decision of Court.

Order of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

ELLIS, J., dissents.

BROWNE, C. J., not participating.

DOLAR M. SMITHERMAN, *Appellant*, v. FANNIE C. SMITHERMAN, *Appellee*.

Decision Filed July 29, 1920.

An Appeal from a Decree of the Circuit Court Within and for the County of Escambia; A. G. Campbell, Judge.

J. N. Hutchins and Jno. Clay Smith, for Appellant;

John P. Stokes, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Decree; it is, therefore, considered, ordered and adjudged by the Court that the said Decree of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Crowder v. Grunauer—Decision of Court.

F. A. CROWDER, *Plaintiff in Error*, v. S. GRUNAUER, TRADING AS GRUNAUER BROTHERS, *Defendant in Error*.

Decision Filed July 29, 1920.

Writ of Error to a Judgment of the Circuit Court Within and for the County of Columbia; M. F. Horne, Judge.

J. B. Hodges, for Plaintiff in Error;

R. T. Boozer and *W. H. Boozer*, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Judgment; it is, therefore, considered, ordered and adjudged by the Court that the said Judgment of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Abbott et al. v. Bowers—Decision of Court.

JOHN W. ABBOTT, H. PICKENS, C. JOHNSON AND JULIA
PICKENS, *Appellants*, v. L. E. BOWERS, *Appellee*.

Decision Filed July 29, 1920.

An Appeal from a Decree of the Circuit Court Within
and for the County of Okaloosa; D. J. Jones, Judge.

W. W. Clark, for Appellants;

W. J. Rice and Daniel Campbell & Son, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Decree; it is, therefore, considered, ordered, and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Bass v. Alderman—Syllabus.

OSCAR BASS, OTHERWISE KNOWN AS RULL BASS, *Appellant*,
v. R. H. ALDERMAN, AS TAX COLLECTOR OF OKEECHOBEE
COUNTY, FLORIDA, *Appellee*.

Opinion Filed July 29, 1920.

1. An assessment of range cattle by the Tax Assessor in greater numbers than owned by the alleged owner and for a higher valuation than such class of personal property was assessed to other owners in the same county, and without inquiry or investigation either as to numbers or value and for the purpose of discriminating against the alleged owner because he was a non-resident, is void.
2. A herd of cattle upon the range the ownership of which is protected in some measure by recorded marks and brands under the law constitutes property of such peculiar character, that a clear remedy does not exist at law for a trespass, which results in scattering many units of the herd over the county to be possessed by other owners of cattle in herds upon common ranges and a practical division of the mark and brand of the owner.

An Appeal from the Circuit Court for Okeechobee County; E. B. Donnell, Judge.

Order reversed.

Johnston & Garrett, for Appellant;

George F. Parker, for Appellee.

ELLIS, J.—This is an appeal from an order sustaining a demurrer to a bill in chancery and dissolving a temporary injunction granted upon the application of the complainant restraining R. H. Alderman as Tax Collector and his deputies, servants and employees from interfering with

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the complainant in his ownership and possession of certain stock cattle.

It is alleged in the bill of complaint that the complainant is the owner of certain stock cattle which range in the County of Okeechobee, that the Tax Collector threatens to levy upon the cattle for the payment of taxes on personal property assessed against the complainant for the year 1918.

That the complainant duly returned his cattle for taxation in the Spring of 1918 and estimated the number at 2500, but the Tax Assessor arbitrarily without inquiry or investigation assessed the number of cattle to complainant at 5,000; that such assessment was made for the purpose of discriminating against the complainant and requiring him because he was a non-resident to pay a larger tax than was just and right. That the Assessor admitted to complainant that there was included in the assessment cattle which belonged to other persons all of whom were, although members of the complainant's family, *sui juris* save one. That the complainant did not have during the year 1918 at any time 5,000 head of cattle ranging in Okeechobee County, that he never had at any time during such period more than 2,700 head of cattle. Complainant complained to the Board of County Commissioners of the assessment, but the Board refused to reduce the amount of the assessment although it did offer to reduce the number of cattle named in the assessment to four thousand. That the County Commissioners and Tax Assessor have discriminated against the complainant to his injury, in that other cattle owners in the county have been assessed upon a less number of cattle in proportion to their holdings than was assessed against the complainant.

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The bill recites many instances where upon application of the owners the assessment on range cattle was reduced by the Board of County Commissioners from one-third to over 50% but it refused to reduce the complainant's assessment to the number of cattle owned by him. That the valuation of his property as fixed by the Assessor for taxation is higher than like property of other persons in the same situation is valued. That the Tax Collector by selling the complainant's cattle in small quantities will cause irreparable injury to the complainant in that the value of his possessions in that character of property depends upon the recognition by all persons of the ownership by him of all cattle in that county bearing certain marks and brands of which the complainant is exclusive owner. That a "large bulk of his cattle" he has contracted to sell and the cattle are being gathered for sale. That the sale and distribution by the collector of cattle of the complainant in small quantities would make it impossible to keep his marks and brands separate and distinct from those of other persons which would result in financial loss to him which could not be estimated accurately.

A demurrer admitting these allegations of fact was sustained and a restraining order which had been previously granted dissolved.

The allegations of fact admitted by the demurrer show the assessment of the complainant's cattle to have been erroneous, arbitrary, discriminatory and unlawful. To compel him to part with his property upon such an abuse of the taxing power as he alleges in the bill of complaint is to sanction the intentional disregard of the law by those officers charged with the duty of assessing property for taxation.

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The Chancellor in his order dissolving the restraining order held that he was without authority to enjoin the sale of personal property for taxes unless there is some "peculiar value attached to it" or the damages resulting irreparable, not that the action as alleged of the Assessor or the Board of County Commissioners was in compliance with the law.

The bill charges an intentional over-valuation of the complainant's property for the purpose of discriminating against him. Complainant alleges that his taxes amounted to \$1,788.00, "being a total millage of about thirty-six mills assessed against a number of cattle aggregated on the tax roll of said county as five thousand head." These cattle were alleged to be range cattle.

It is a mere matter of calculation to show that the cattle were valued at about nine dollars and ninety cents per head. In paragraph two of the bill the complaint alleges that like property of other owners was not only assessed for less per head than the complainant's cattle, but the number assessed to the other owners was less than they owned. In one case cattle were assessed at about \$6.40 per head; this was reduced to about \$2.67 per head. In another case cattle were assessed at about \$8.13 per head, the assessment was reduced to about \$3.90 per head. In another case cattle were assessed at about \$8.33 per head, that assessment was reduced to about \$1.67 per head; and several other reductions in about the same proportion were alleged. The good faith of the tax officials and validity of their actions which are presumed are overcome by such allegations, the burden of proof of course is upon the complainant. See *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 South. Rep. 416; *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 81 South. Rep. 503.

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Whether the owner of this class of property may have relief in equity from the unlawful and invalid assessment of it by the tax officials is the question presented in this case.

The rule is that except in peculiar or extraordinary cases courts of equity have no jurisdiction to enjoin a levy or a trespass upon property or to enforce a mere legal right to it where there is a clear remedy at law. See *Wordehoff v. Evers & Bird*, 18 Fla. 339.

If the personal property of the complainant is of such peculiar character that a *clear* remedy is not afforded at law for the threatened trespass the complainant would be entitled to his injunction because the bill contains equity entitling the complainant to an annulment of the assessment upon the ground that the alleged action of both the Assessor and Board of County Commissioners constitutes a fraud upon the complainant and their conduct resulted in such an unjust assessment as to violate a fundamental principle of the constitution relating to the exercise of the taxing power. *Camp Phosphate Co. v. Allen*, *supra*; 26 R. C. L. 460; *Odlin v. Woodruff*, 31 Fla. 160, 12 South. Rep. 227.

Would a levy upon the complainant's range cattle by the Tax Collector result in such irreparable mischief that the complainant could not be adequately compensated in an action of trespass? If so the injunction should not have been dissolved and the discretion of the Chancellor in not retaining it was abused. In the first place if the property should be levied upon and sold the proceeds of the sale to the amount of the tax levied would be paid partly into the State and partly into the county treasury and could not be recovered by any legal proceeding what-

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ever. The inequality of the position of the taxpayer and the collector who is intrusted with such extensive and drastic governmental power is apparent. 26 R. C. L. 462.

Whether the Tax Collector would be liable at all civilly the assessment not appearing to be invalid upon its face need not be determined because in the view we have of the character of the complainant's property the peculiar conditions under which it is held and the circumstances which contribute to its value as a herd render it exceedingly difficult if not impossible to estimate the damage which the complainant would sustain by a sale of small bunches of cattle taken indiscriminately from his herd. Manifestly the value of the cattle sold which is the measure of damages at law, would not compensate him because there would remain the injury resulting from several persons in the same neighborhood or county possessing cattle with his mark and brand the value of which to him consists in the recognition by every one in the county of his ownership of cattle under such mark and brand. The confusion and possible strife which might result between cattle owners possessing cattle in the same mark and brand could not be estimated in dollars, nor can any one foresee where controversies thus engendered would end. The seeds would be sown for difficulties in every "round up" or every sale of a "bunch of cattle." The owner of the main herd could no longer represent to a prospective purchaser that his herd consisted of so many head because as time passed the increase in the cattle sold would introduce another difficulty in the matter of identification and listing so that as of old between Abram and Lot there would be "strife" between the herdsmen of their cattle.

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Under the circumstances the breaking up of the complainant's herd of cattle by the Tax Collector, the scattering of cattle in the complainant's mark and brand over the county to many purchasers, the injury to the value of the mark and brand owned by him and the resultant annoyances and strife which would likely result from conflicting claims through years following is an injury which cannot be compensated in dollars and impossible of estimate. The cattle owned by him in the numbers and under the conditions alleged are of peculiar and extraordinary value.

The order sustaining the demurrer and dissolving the injunction is reversed.

BROWNE, C. J. AND TAYLOR AND WEST, J. J., concur.

WHITFIELD, J., dissents.

WHITFIELD, J., dissenting.—A court of equity should not entertain a bill for an injunction against a tax collector who threatens to seize and sell personal property for the non-payment of taxes, except in rare cases, where the property is peculiarly valuable and cannot be compensated adequately in damages. This is true, even if the officer is acting without lawful authority, as such seizure is a mere trespass, remedial by action at law. Where an injunction is prayed on the ground of irreparable injury, the bill of complaint should allege facts to enable the court to determine whether the injury will be irreparable. A mere general allegation that the injury will be irreparable is not sufficient. When the facts alleged do not show that irreparable injury will be sustained, an injunction should be granted. *H. W. Metcalf Co. v. Martin*, 54 Fla. 531, 45 South. Rep. 463, 127 Am. St.

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Rep. 149. See also Bryan v. Long, 14 Fla. 366; Baldwin v. Tucker, 16 Fla. 258; Crawford v. Bradford, 23 Fla. 404, 2 South. Rep. 782; Odlin v. Woodruff, 31 Fla. 160, 12 South. Rep. 227; City of Jacksonville v. Massey Business College, 47 Fla. 339, 36 South. Rep. 432; Florida Packing & Ice Co. v. Carney, 49 Fla. 293, 38 South. Rep. 602; Williams v. Peeples, 48 Fla. 316, 37 South. Rep. 572; Hendry v. Whidden, 48 Fla. 268, 37 South. Rep. 571; Wordehoff v. Evers, 18 Fla. 339; Finnegan v. City of Ferdinandina, 15 Fla. 379; King v. Gwynn, 14 Fla. 32; Town of Orange City v. Thayer, 45 Fla. 502, 34 South. Rep. 573; Singer Sewing Mach. Co. of New Jersey v. Benedict, 229 U. S. 481, 33 Sup. Ct. Rep. 942; Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. Rep. 454, L. R. A. 1916-A 965 and notes.

The allegations as to the peculiar nature and value of the range cattle and of the difficulty of distinguishing separate ownerships of cattle bearing complainant's marks and brands do not show that an irreparable injury would result from a tax sale any more than from a voluntary sale of portions of the range cattle. Fraud is not shown.

H. WHITAKER, AS SHERIFF OF ESCAMBIA COUNTY, FLORIDA,
Plaintiff in Error, v. G. F. PARSONS, *Defendant in Error*.

Opinion Filed July 30, 1920.

1. The court takes judicial notice that cattle raising is an important industry in this State.
2. To prescribe and enforce regulations suitable to foster the cattle raising industry in furtherance of the general wel-

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fare are within the sovereign governmental powers of the State to be exercised through enactments by the lawmaking department.

3. The character and extent of appropriate regulations to be enforced for any given purpose are within the discretion of the lawmaking power, subject only to organic provisions securing private rights.
4. Compulsory eradication of ticks from cattle by "dipping" the cattle in solutions that destroy the ticks may be an appropriate and effective means of preserving the health and well-being of the cattle and the due enforcement of reasonable regulations to accomplish such a salutary purpose is within the sovereign powers of the State, whether exerted as a police taxation, eminent domain or other governmental power.
5. All governmental powers of the State are subject to the limitations imposed by the Constitution of the State and to applicable provisions of the Federal Constitution; the organic provisions being designed to secure all individual rights that are consistent with efficient government to conserve the general welfare.
6. Individual rights to life, liberty and property are in law acquired and enjoyed subject to the exercise of the regulating powers of government; and such rights are not protected by the Constitution from the due exercise of such governing powers.
7. The purpose of constitutional government is to secure individual rights subject to valid regulations enacted in the interest of the public good.
8. The organic provisions requiring due process and equal protection of the laws in depriving individuals of life, liberty or property expressly recognize that the right to protect life, liberty and property is not absolute, but that it is subject to restrictions that must necessarily be imposed by the lawmaking power, "in order to secure the blessing of con-

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stitutional liberty," in "maintaining public order," to "insure domestic tranquillity," and "to promote the general welfare."

9. The provisions of Chapter 7345, Acts of 1917, relating to the compulsory dipping of cattle to avoid the evils of tick infection are within the regulating powers of the State, to the exercise of which power property rights are subject; and the statute itself does not abridge the privileges or immunities of any citizen or deny to any one due process or equal protection of the laws.
10. If rights of individuals are violated by arbitrary, unreasonable or illegal action in applying a statute, a remedy is available in due course of legal proceedings.
11. The provisions of Chapter 7345, Acts of 1917, relative to compulsory cattle dipping to eradicate tick infection do not in terms or purpose arbitrarily or illegally invade personal or property rights or delegate legislative powers in violation of the Constitution.
12. The Legislature having all the lawmaking power of the State that is not withheld by the Constitution, may prescribe duties to be performed by officers expressly provided for by the Constitution, in addition to the duties of those officers that are defined in the Constitution, where not forbidden by the organic law.
13. The Constitution does not withhold from the Legislature the power to prescribe additional duties to be performed by the State Treasurer or others of "the administrative officers of the executive department" that are not inconsistent with their duties as defined by the Constitution; and such duties may be to act as members of Boards or Commissions in conjunction with other officers who are provided for by statute, the commissions issued to constitutional officers being sufficient to cover any duties imposed upon them by law.
14. Chapter 7347, Acts of 1917, is a general law potentially applicable to all the counties of the State exerting a sovereign power of the State for a general State purpose.

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15. The local option features of Chapter 7345, Acts of 1917, do not delegate to the counties the power to declare what the law shall be or how it shall operate when it becomes effective, but it enables the counties respectively to determine by an election whether certain provisions of a complete statute shall become operative in the particular counties. This is not an unconstitutional delegation of lawmaking power.

A Writ of Error to the Court of Record for Escambia County; C. Moreno Jones, Judge.

Judgment reversed.

Van C. Swearingen, Attorney General, *D. Stuart Gillis*, Assistant, and *Myers & Myers*, for Plaintiff in Error,

John P. Stokes and *John S. Beard*, for Defendant in Error.

WHITFIELD, J.—By petition to the Court of Record for Escambia County, Florida, G. F. Parsons alleged that he was held in custody by the Sheriff under a warrant of arrest charging that he “did in violation of Chapter 7345, Acts of 1917, Laws of the State of Florida, knowingly and wilfully violate and fail to keep and perform certain Rules and Regulations regularly and lawfully made and promulgated by the State Live Stock Sanitary Board of the State of Florida, by then and there, as owner, custodian and in charge of certain cattle, in said Justice of the Peace District, after being served with notice and receiving instructions concerning the methods of systematic tick eradication, failed to dip such cattle on said 30th day of April, A. D. 1920, at the Pleasant Grove vat, located at Pleasant Grove, in said Justice of the Peace District, as he was designated to do at such time and

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place by official notice duly and legally served upon him personally, on the 16th day of April, A. D. 1920; and that, at said time, and in said place, the said Chapter 7345, Acts of 1917, Laws of the State of Florida, was then and there in full force and effect, and before said time a special election had been called and held in Escambia County, Florida, according to the laws governing special elections, at which a majority of the qualified electors voting in said election had declared in favor of compulsory systematic tick eradication work and compulsory cattle dipping, and all acts, matters, things, resolutions and notices had been done, performed and published by said State Live Stock Sanitary Board of the State of Florida, to put said Chapter 7345, Acts of 1917, Laws of the State of Florida, in full force and effect in said County of Escambia at the time and at the place mentioned."

It is further alleged that petitioner's "detention and custody and deprivation of liberty of said H. Whitaker, as such Sheriff, is without authority of law and is in violation of the Constitution of the United States and the Constitution of Florida, in that said Chapter 7345, Acts 1917, Laws of the State of Florida, is in violation of the 14th Amendment to the Constitution of the United States, in that it deprives petitioner of his liberty and property without due process of law, and deprives him of equal protection of the laws, and it abridges his privileges and immunities as a citizen of the United States, and for the same reasons is in violation of Section 12, Declaration of Rights, Constitution of the State of Florida, and is in violation of Section 15, Article 16, of the Constitution of the State of Florida, and is in violation of Article 3 of the Constitution of the State of Florida, and is in violation of Section 24, Article 4 of

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the Constitution of the State of Florida, and is in violation of Section 20, Article 3 of the Constitution of the State of Florida, and is in violation of Section 22 of the Declaration of Rights, Constitution of the State of Florida, and is in violation of Section 15, Article 3 of the Constitution of the State of Florida, and is in violation of other provisions of the Constitution of the State of Florida."

A writ of *habeas corpus* was prayed for, issued and served on the Sheriff, who made return "that the said G. F. Parsons was by me arrested and is by me held under the authority and by virtue of a certain warrant issued by William L. Johnson, Justice of the Peace, on the first day of May, 1920, a copy of which said warrant is attached to the petition for writ of habeas corpus herein and is by reference thereto made a part hereof; and the said G. F. Parsons is not by me held by any other writ, process or authority."

A motion to quash the return was made upon the grounds "that the respondent seeks to justify the detention of petitioner pursuant to a prosecution based upon Chapter 7345, Acts of 1917, Laws of the State of Florida, and said purported Act is unconstitutional and void for the following reasons: That said purported Act is violative of the 14th Amendment to the Constitution of the United States, in that it deprives the petitioner of his liberty without due process of law, and abridges his privileges and immunities as a citizen of the United States and denies to him the equal protection of the laws; is violative of Sections 1 and 12, Declaration of Rights, Constitution of the State of Florida, in that, under its provisions, all men are not equal before the law, and because it deprives petitioner of his liberty and property without

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due process of law; is violative of Section 15, Article 16, Constitution of the State of Florida, in that it provides that the same person shall hold and perform the functions of more than one office under the Government of this State at the same time; is violative of Section 27, Article 3, of the Constitution of the State of Florida, in that, under its provisions, the Legislature provided for the creation of officers and did not provide for their election by the people or appointment by the Governor, and did not, by law, fix their duties and compensation; is violative of Section 24, Article 4, of the Constitution of the State of Florida, in that it imposes duties upon the Treasurer of the State of Florida, in addition to the duties imposed upon him by the Constitution of Florida; is violative of Article 3 of the Constitution of the State of Florida, in that it undertakes to delegate to the State Live Stock Sanitary Board, and to the electors in a particular county the power to legislate; is violative of Section 22 of the Declaration of Rights, Constitution of the State of Florida, in that it provides for unreasonable seizures and searches; is violative of Section 16, Article 3, of the Constitution of the State of Florida, in that the body of the Act is broader than its title; is violative of Section 14, Article 4, of the Constitution of the State of Florida, in that it provides for the issuance of commissions otherwise than signed by the Governor, countersigned by the Secretary of State, and sealed with the Great Seal of the State; is violative of Section 5, Article 9, of the Constitution of the State of Florida, in that it authorizes the several counties in this State, which may adopt the provisions of said purported law to assess and impose taxes for other than county purposes; is violative of Section 3, Declaration of Rights of the Constitution of the State of Florida, in that it deprives the citizen of the right of trial

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by jury; is violative of Section 12, Declaration of Rights of the Constitution of the State of Florida, in that it takes private property without just compensation; is violative of Section 24, Article 3 of the Constitution of the State of Florida, in that it does not provide for a uniform system of county government, except in cases where local and special laws are provided by the Legislature that may be inconsistent therewith; is violative of Section 20, Article 3 of the Constitution of the State of Florida, in that it is a special and local law and purports to regulate the jurisdiction of duties of County Commissioners, of the Treasurer, Commissioner of Agriculture and Superintendent of Public Instruction; and purports to relate to the assessment and collection of taxes for State and County purposes, and purports to regulate the practice of courts of justice other than municipal courts, and purports to provide for the punishment of crime and misdemeanor, and was enacted by the Legislature without publication in Escambia County of notice of intention to apply to the Legislature therefor, and that said purported Act imposes duties and burdens upon citizens in Escambia County that are not imposed upon citizens in Santa Rosa County similarly situated, and imposes such duties and burdens upon citizens of Escambia County that are not imposed upon other citizens in the same county who are similarly situated; and said purported Act purports to authorize the expenditure of State funds in certain counties of the State while such funds are not expended in other counties of the State, although such funds are raised by general taxation of all the people of the State of Florida, and, under the provisions of said purported Act, the liberty and the property of the citizens are subject to the whim and caprice of the State Live Stock Sanitary Board in the first instance, and to its officers,

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employees and agents in the administration and enforcement of such purported law, and the regulations prescribed by the State Live Stock Sanitary Board.

The court rendered the following judgment:

“This cause coming on to be heard upon motion to quash the return of the Sheriff to the writ of habeas corpus heretofore issued, and counsel upon both sides having been heard, and the same having been considered by the Court,

“IT IS HEREBY ORDERED AND ADJUDGED, that the said motion be, and the same is hereby, sustained,

“AND IT IS FURTHER ORDERED AND ADJUDGED, that the petitioner, the said G. F. Parsons, be, and he is hereby, discharged from custody.”

A writ of error was allowed and taken by the Sheriff under the statute, Sec. 2257, Gen. Stats., 1906, Compiled Laws, 1914.

The court takes judicial notice that cattle raising is an important industry in this State. To prescribe and enforce regulations suitable to foster the industry in furtherance of the general welfare, are within the sovereign governmental powers of the State to be exercised through enactments by the lawmaking department. The character and extent of appropriate regulations to be enforced for any given purpose are within the discretion of the lawmaking power, subject only to organic provisions securing private rights. Compulsory eradication of ticks from cattle by “dipping” the cattle in solutions that destroy the ticks may be an appropriate and effective means of preserving the health and well-being of the cattle; and the due enforcement of reasonable regulations to accomplish such a salutary purpose is within the sovereign

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powers of the State, whether exerted as a police, taxation, eminent domain or other governmental power.

All governmental powers of the State are subject to the limitations imposed by the Constitution of the State and to applicable provisions of the Federal Constitution; the organic provisions being designed to secure all individual rights that are consistent with efficient government to conserve the general welfare. Individual rights to life, liberty and property are in law acquired and enjoyed, subject to the exercise of the regulating powers of government; and such rights are not protected by the Constitution from the due exercise of such governing powers. The purpose of constitutional government is to secure individual rights subject to valid regulations enacted in the interest of the public good. Consequently the Constitution does not protect rights which are claimed in violation of valid statutory regulations that are enacted to accomplish governmental purposes; and such statutes are valid where they afford due process and equal protection and do not violate some specific organic provision, though they may in effect deprive individuals of life, liberty and property to accomplish the purposes for which the Constitution was adopted. The governmental authority to regulate by due course of law does not deny to any one the *right* to lawfully protect life, liberty and property. The Constitution secures to "all men" the "inalienable right" to protect individual life, liberty and property as the right may be regulated by due course of law to accomplish the governmental purposes as expressly stated and provided for in the controlling organic provisions.

The State Constitution in its preamble declares that it is established "in order to secure" the "blessings" of "constitutional liberty," and in the Declaration of Rights

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ordains that "government is instituted for the protection, security and benefit of the citizens." As the powers of government operate upon persons and property, all personal and property rights are held subject to the due exercise of the sovereign governmental regulating power, therefore, considered in connection with the expressed purposes of the Constitution, the organic provision that "all men are equal before the law and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and obtaining safety," does not confer upon individuals absolute or unlimited rights to life, liberty or property. The quoted organic provision does secure property rights against arbitrary and oppressive governmental invasion, but it does not protect personal or property rights from a due exercise of the governmental regulating power to which all individual rights are subject to accomplish the purposes for which the Constitution was established as the controlling law over all persons. The organic provisions requiring due process and equal protection of the laws in depriving individuals of life, liberty or property expressly recognize that the right to protect life, liberty and property is not absolute, but that it is subject to restrictions that must necessarily be imposed by the lawmaking power, "in order to secure the blessings of constitutional liberty," in "maintaining public order," to "insure domestic tranquility," and "to promote the general welfare."

The provisions of the statute relating to the compulsory dipping of cattle to avoid the evils of tick infection are within the regulating powers of the State, to the exercise of which power property rights are subject; and the statute itself does not abridge the privileges or immunities of any citizen or deny to any one due process

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or equal protection of the laws. If rights of individuals are violated by arbitrary, unreasonable or illegal action in applying the statute, a remedy is available in due course of legal proceedings.

The court does not take judicial notice of regulations prescribed by the Board. *Pierson v. State*, Ala. App —, 76 South. Rep. 487-8.

The provisions of the statute under which the arrest was made do not in terms or purpose arbitrarily or illegally invade personal or property rights or delegate legislative powers in violation of the Constitution. *Bailey v. Van Pelt*, 78 Fla. 337, 82 South. Rep. 789; *State v. McCatty*, 5 Ala. App. 212, 59 South. Rep. 543; *Ferguson v. Starkey*, 192 Ala. 471, 68 South. Rep. 348.

The Legislature having all the lawmaking power of the State that is not withheld by the Constitution, may prescribe duties to be performed by officers expressly provided for by the Constitution, in addition to the duties of those officers that are defined in the Constitution, where not forbidden by the organic law; and the Constitution does not withhold from the Legislature the power to prescribe additional duties to be performed by the State Treasurer or others of "the administrative officers of the executive department" that are not inconsistent with their duties as defined by the Constitution; and such duties may be to act as members of boards or commissions in conjunction with other officers who are provided for by statute, the commissions issued to constitutional officers being sufficient to cover any duties imposed upon them by law. In such cases the incumbent does not "hold or perform the functions of more than one office under the government of this State at the same time," within the meaning and purpose of that quoted provision

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of the Constitution. While in defining generally the duties of the State Treasurer, the Constitution does not include therein "such other duties as may be prescribed by law" as is done in the case of the other "administrative officers of the executive department," yet such omission is not an implied limitation upon the power of the Legislature to impose additional administrative duties upon the State Treasurer that are not inconsistent with those stated in the Constitution. The Constitution itself makes the State Treasurer a member of the Board of Commissioners of State Institutions (Sec. 17, Art. IV), and also a member of the State Board of Education (Sec. 3, Art. XII). This indicates that the duties of the State Treasurer defined in Sec. 24, Art. IV, do not exclude other duties that may be imposed by law. When the constitutional provision relating to the duties of the State Treasurer was first adopted (Sec. 4, Art. VII, Const. 1868), that officer was then by statute one of the Trustees of the Internal Improvement Fund of the State, which is a State agency with extensive administrative powers and duties, all of which are conferred by statute. Sec. 2, Chap. 610, Laws of Florida, approved Jan. 18, 1855.

In providing, Section 1, Chapter 7345, Acts of 1917, that "there is hereby created and established a Board to be known and designated as the State Live Stock Sanitary Board, which shall be composed of the Commissioner of Agriculture, the Superintendent of Public Instruction, the State Treasurer, and two other members who shall be appointed by the Governor, the statute merely authorizes the appointment of two officers by the Governor, and imposes duties upon the three State officers who with the two officers appointed constitute the State Board with designated duties. This does not create new offices for the three State officials. It adds

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new administrative duties to existing administrative offices. The duties imposed are not inconsistent with the duties defined in the Constitution.

The Constitution provides that certain State officers shall constitute boards for State administrative purposes, and this does not create additional offices for the named officers. It merely adds to the other duties of the officers. The fact that separately the designated officers have different duties and authority does not prevent them from acting conjointly as members of a board having specific statutory duties to perform collectively. Likewise, when a statute provides that stated officers shall constitute a board with administrative functions no new offices are thereby created, but new duties are imposed upon officers already in commission. If constitutional administrative officers may legally constitute a board or act conjointly in performing official functions, no reason is perceived why constitutional officers and statutory officers may not likewise act conjointly pursuant to a statute without making the constitutional officers in effect the holders of two offices in violation of the Constitution. Certainly there is no provision of the Constitution which expressly or by fair implication forbids the lawmaking power to add to the duties of constitutional State administrative officers, even if those duties are to be performed in connection with statutory officers who have no duties other than those to be exercised conjointly with constitutional officers. See Ann. Cas. 1913D 507.

Numerous statutes of the State impose upon State and County officers duties that may be performed by the incumbents of other offices that may be created for that purpose. The State Treasurer is a member of the Railroad Assessing Board, of the Pension Board, and other

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statutory boards. The State Treasurer is also the sole Insurance Commissioner for the State. Many of the statutory duties of the State Treasurer have no relation to his duties as defined in Section 24 of Article IV of the Constitution; and this legislation runs through many years of unchallenged interpretation of the Constitution by the lawmaking power of the State, which would be persuasive in construction if doubt existed as to the validity of such enactment.

The Sheriff of the county in which the capital is situated, a county officer, provided for by the Constitution, is by statute made the Sheriff of the Supreme Court. Thus by statute a constitutional county officer performs duties that would be appropriate for the incumbent of a State office if it had been created.

The statute here assailed does not purport to establish a uniform system of county government; nor is it a law relating primarily to the governmental powers of a county, therefore Section 24 of Article IV of the Constitution is not violated. The enactment is a general law potentially applicable to all the counties of the State exerting a sovereign power of the State for a general State purpose. See *Carlton v. Johnson*, 61 Fla. 15, 55 South. Rep. 975; *Givens v. Hillsborough County*, 46 Fla. 502, 35 South. Rep. 88; *Fine v. Moran*, 74 Fla. 417, 77 South. Rep. 533. The local option feature of the statute does not delegate to the counties the power to declare what the law shall be or how it shall operate when it becomes effective, but it enables the counties respectively to determine by an election whether certain provisions of a complete statute shall become operative in the particular counties. This is not an unconstitutional delegation of lawmaking power. See *Cotton v. County Com-*

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missioners, 6 Fla. 610; State *ex rel.* Cheney v. Sammons, 62 Fla. 303, 57 South. Rep. 196; State *ex rel.* Crumpton v. Montgomery, 177 Ala. 212, 59 South. Rep. 294; Railroad Commission of Alabama v. Alabama Great Southern R. Co., 185 Ala. 354, 64 South. Rep. 13; 12 C. J. 866; 6 R. C. L. 166; Coleman v. Board of Education of Emanuel County, 131 Ga. 643, 63 South. Rep. 41; Cain v. Commissioners, 86 N. C. 8; 56 Fla. 617, 32 L. R. A. (N. S.) 639.

Other questions not affecting the validity of the provisions of the statute here involved will not be discussed, as the petitioner is not entitled to have them decided.

Whether the statute serves a State or a county purpose or both, if not authoritatively determined by its enactment, the question does not come within the purview of the issues the petitioner is entitled to have determined.

On the showing made the alleged invalidity of the statutory provisions here involved does not appear, and the judgment discharging the petitioner should be and is reversed.

TAYLOR AND WEST, J. J., concur.

ELLIS, J., dissents.

BROWNE, C. J., not participating.

City of St. Augustine et al. v. St. Johns Elec. Co.—Decision of Court.

THE CITY OF ST. AUGUSTINE, A PUBLIC CORPORATION, EXISTING IN THE STATE OF FLORIDA, AND J. E. INGRAHAM, MAYOR, H. W. DAVIS, ACTING MAYOR, AND K. LOPEZ, ALL COMPOSING THE BOARD OF CITY COMMISSIONERS OF THE CITY OF ST. AUGUSTINE, FLORIDA, AND J. J. MURPHY, CITY TREASURER AND COLLECTOR OF THE CITY OF ST. AUGUSTINE, FLORIDA, *Appellants*, v. ST. JOHNS ELECTRIC COMPANY, A CORPORATION, *Appellee*.

Decision Filed July 30, 1920.

An Appeal from an order of the Circuit Court within and for the County of St. Johns; George Couper Gibbs, Judge.

E. Noble Calhoun, for Appellants;

George W. Bassett, Jr., and *David R. Dunham*, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the order aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

State ex rel. R. R. Coms. v. S. G. Ry. Co.—Syllabus.

STATE OF FLORIDA *ex rel.*, RAILROAD COMMISSIONERS, *Relators*, v. SOUTH GEORGIA RAILWAY COMPANY, A CORPORATION, *Respondent*.

Opinion Filed August 2, 1920.

An order of the Railroad Commissioners commanding a railroad company "to re-establish, reinstate and operate" between points in this State, one of the points being near the State line, two passenger trains that had been operated as interstate trains, but had been discontinued on account of inability to get coal for engine fuel, will not be enforced by mandamus, since even if on the facts shown the order is not in effect to reinstate an interstate train, not within the authority of the Commissioners, the circumstances shown as to local conditions, the service being rendered by other trains, the meagerness of the public necessity and convenience to be served by added trains, the large expense to the carrier and its destructive effect upon the carrier's property rights, clearly show that the order is not "reasonable and just and such as ought to have been made in the premises," within the meaning of the statute under which the authority is exerted; the facts and circumstances of the case not making applicable here the principles applied in *Missouri Pac. R. Co. v. State of Kansas ex rel. Railroad Com'rs*, 216 U. S. 262, 30 Sup. Ct. Rep. 330.

A case of original jurisdiction.

Alternative writ dismissed.

Dozier A. DeVane, for Relators;

Branch & Snow and *W. B. Davis*, for Respondent.

PER CURIAM.—The alternative writ of mandamus herein commands the respondent "to re-establish, reinstate

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and operate passenger trains Nos. 3 and 4 between Perry, Florida, and Lovett, Florida,” or to show cause for not doing so. By answer it appears that the respondent operates passenger trains Nos. 1 and 2, one each way, daily between Quitman, Georgia, and Hampton Springs, Florida, on which line are the towns of Lovett and Perry, in the State of Florida, making convenient connections with other lines; that respondent's passenger trains Nos. 3 and 4 also were operated between Quitman, Georgia, and Hampton Springs, Florida, one each way daily; but that trains 3 and 4 were discontinued because of the inability to get coal for engine fuel; that the country served by the line is sparsely settled, and in effect that the statements made indicate that the expense of operating trains 3 and 4 will be greatly out of proportion to the public convenience thereby met and will impair the respondent's organic property rights.

A motion of relators for a peremptory writ on the answer was denied. Replications were filed alleging that the respondent has never filed with the Railroad Commissioners of the State “any petition or request for the permanent discontinuance of the train service sought to be re-established.” Respondents demurred to the replication.

As it appears the trains Nos. 3 and 4 were, as operated, interstate trains, the respondents did not have to apply to the State Railroad Commissioners for their discontinuance. The alternative writ commands the respondent “to re-establish, reinstate and operate passenger trains Nos. 3 and 4” between points in this State. Even if this is not on the facts shown, in effect an order to reinstate an interstate train, not within the authority of the State Commission, the circumstances shown as the local condi-

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tions, the service being rendered, the meagerness of the public necessity and convenience to be served by added trains, the large expense to the carrier and its destructive effect upon the carrier's property rights, clearly show that the order is not "reasonable and just and such as ought to have been made in the premises," within the meaning of the statute under which the authority is exerted. See Par. 13 of Sec. 3, Chap. 6527, Acts of 1913; *State ex rel. Railroad Commissioners v. Florida East Coast Ry. Co.*, 71 Fla. 433, 71 South. Rep. 543; *State ex rel. Railroad Comm'rs. v. Atlantic Coast Line R. Co.*, 77 Fla. 366, 81 South. Rep. 498.

This holding does not conflict with the decision in *Missouri Pac. R. Co. v. State of Kansas ex rel. Railroad Com'rs*, 216 U. S. 262, 30 Sup. Ct. Rep. 330, where the local conditions, the service being rendered, the public necessity and convenience and the burden to the carrier being essentially different from this case, justified the enforcement of an order for one passenger train to be operated to the State line instead of a mixed passenger and freight train, such order not requiring the "re-establishment" of a train that had been operated as an interstate train.

The decision of this case does not ignore the principles announced in *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. Rep. 585; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179, U. S. 287, 21 Sup. Ct. Rep. 115; *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 62 Fla. 315, 57 South. Rep. 175; *State ex rel. Railroad Com'rs. v. Louisville & N. R. Co.*, 63 Fla. 274, 57 South. Rep. 673, and other like cases. In this case principles are applied that are recognized in, but held to be not applicable to the cited cases.

Mach v. Mayo—Syllabus.

The demurrer to the replication is sustained and the alternative writ is dismissed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

EMIL MACH, *Plaintiff in Error*, v. NATHAN MAYO, *Defendant in Error*.

Opinion Filed August 2, 1920.

1. A plea denying the existence of the relation in which defendants are sued imposes upon the plaintiff the burden of proving the existence of the relation as alleged.
2. Whether the facts constitute a partnership relation between persons is a question of law.
3. It is competent for a witness to testify as to the facts which it is claimed constitute the partnership relation between certain persons, but he may not testify as to his opinion concerning the existence of the relation.
4. Instructions upon abstract propositions of law which are inapplicable to the evidence and tend to mislead and confuse the jury to the injury of the complaining party constitute reversible error.

L. W. Duval, for Defendant in Error.

Johnston & Garrett, for Plaintiff in Error;

A writ of error to the Circuit Court for Sumter County;
W. S. Bullock, Judge.

Judgment reversed.

Mach v. Mayo—Opinion of Court.

ELLIS, J.—Nathan Mayo brought an action against J. C. Ledbetter and Emil Mach as co-partners doing business under the name and style of Mach Crate Company, alleging that on August 1st, 1919, the defendants as co-partners were indebted to him in the sum of \$1,433.59 for money payable, for goods bargained and sold; for work done and material furnished and on account stated. To this declaration Emil Mach pleaded: First, that he is not and never was a co-partner with J. C. Ledbetter; second, never was indebted. Default was entered against Ledbetter and there was a verdict and judgment for the plaintiff against the defendants as co-partners in the sum of \$1,433.57. Emil Mach took a writ of error and obtained an order of severance as to Ledbetter. There are fourteen assignments of error.

The burden of proof was upon the plaintiff to establish the relation of co-partnership between Ledbetter and Mach or to show that Mach held himself out as a partner of Ledbetter or permitted himself to be held out as such to the plaintiff who was misled by such holding out on Mach's part and induced to extend the credit to what he believed was the co-partnership. See Rule 24 Circuit Courts Law Actions; *Van Deman & Lewis Co. v. Demos*, 64 Fla. 533, 60 South. Rep. 342; *Doggett v. Jordan*, 2 Fla. 541; *Snowden v. Cunningham*, 59 Fla. 604, 51 South. Rep. 543; *Smith v. Westcott*, 34 Fla. 430, 16 South. Rep. 332; 21 Standard Ency. of Proc., 79; 20 R. C. L. 849; 10 R. C. L. 898; *Dubos v. Jones*, 34 Fla. 539, 16 South. Rep. 392; *Webster v. Clark*, 34 Fla. 637, 16 South. Rep. 601; *Marx v. Culpepper*, 40 Fla. 322, 24 South. Rep. 59.

The plaintiff sought to hold the defendants jointly liable upon the alleged indebtedness, but he alleged the existence of a partnership between them. There was no

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evidence to prove such relation. It is true that the plaintiff testified that "J. C. Ledbetter held *himself* out as a partner of Emil Mach" and that the plaintiff was satisfied that Mach and Ledbetter were partners. But whether certain facts constitute a partnership relation is a question of law and a witness may not settle the question of law by merely giving his opinion as to the fact of partnership. Now assuming that the plaintiff could recover in this action by showing a holding out by Mach that he was a partner of Ledbetter although no partnership in fact existed there is nothing in the evidence to justify the verdict.

It is unnecessary to quote the witnesses at length. The letter of Emil Mach to J. C. Ledbetter dated May 22, 1919, in which he discussed the formation of a corporation expressly stated that pending the completion of the corporation "this is not to be considered a partnership because I am advancing all the money being solely indebted on all debts." Ledbetter was to get one-half of the stock of the corporation. The letter of the plaintiff to Ledbetter dated May 14, 1919, was a proposition made to Ledbetter alone to sell him the material. The mill property was not purchased from H. O. Collier until May 26, 1919. The Mach Crate Company which purchased the mill property was composed of Emil and Ernest Mach. The fact that Mayo, the plaintiff, was paid for much of the material consisting of block sold to Ledbetter, by drafts on the Mach Crate Co. of Kissimmee does not establish the existence of a co-partnership between Ledbetter and Emil Mach. Ledbetter swore that he and Mach were partners, but he testified to no facts which in law constituted a co-partnership and his mere assertion of the existence of the relation did not bind Mach. Ledbetter himself testi-

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fied that at the time he "made the deal for the blocks and took the option" he did not know who would "go in" with him. He thought it would be either "Emil Mach or a banker at Ft. Meade." Some witnesses testified that at Oxford it was "generally understood" that the business was owned by Ledbetter and Emil Mach, others said by Ledbetter and Mach Brothers, but the actual existence of partnership relations is not established in that manner and that evidence did not tend to prove a holding out by Mach that he and Ledbetter were partners before the plaintiff sold the blocks to Ledbetter.

The court instructed the jury upon the subject of one's liability jointly with another where one holds himself out as a partner with another and induces a third person to extend credit to the supposed partnership. In six instructions this proposition was submitted to the jury. These instructions were inapplicable to the evidence, mere abstract propositions of law tending to mislead and confuse the jury, and were necessarily harmful to the defendant, and constituted reversible error. See *Mullikin v. Harrison*, 53 Fla. 255, 44 South. Rep. 426; *Jacksonville St. Ry. Co. v. Chappell*, 21 Fla. 175; *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 South. Rep. 436; *Savannah, F. & W. Ry. Co. v. Tiedeman*, 39 Fla. 196, 22 South. Rep. 658.

The judgment is reversed.

BROWNE, C. J. AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Anderson v. Tedford—Syllabus.

C. T. ANDERSON, *Petitioner*, v. O. W. TEDFORD, MARSHAL
OF PANAMA CITY, *Respondent*.

Opinion Filed August 4, 1920.

1. A city ordinance which prohibits the holding of any public meeting or meeting of any character upon any street of the city or within any city park without first obtaining permission in writing from the mayor or a majority of the city councilmen, in the absence of any charter provision definitely and specifically empowering the city to prohibit public meetings in the streets or parks of the city, is void for unreasonableness.
2. Under the general power granted to municipalities to preserve the public peace and morals and for the suppression of riots and disorderly assemblies, a city's power over public meetings exists when they create public disturbances, become nuisances or create or threaten some tangible public or private mischief.

A case of original jurisdiction.

Petitioner discharged.

John D. Trammell and *Ed Dykes*, for Petitioner;

J. M. Sapp, for Respondent.

ELLIS, J.—C. T. Anderson was arrested by O. W. Tedford, Marshal of the town of Panama City, and charged with violating Ordinance No. 118, prohibiting the holding of any public meeting or assembly upon any of the streets or in any of the parks of the city without a written permit from the Mayor or a majority of the City Council. Anderson was adjudged to be guilty by the Mayor and sentenced to pay a fine of one hundred dol-

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lars or serve at hard labor on the streets for twenty days, and was "committed to the town jail" until the judgment of the court should be satisfied.

Anderson applied to a justice of this court for a writ of *habeas corpus*, which was issued, returnable before the court.

Section 1 of the Ordinance No. 118 of Panama City provides that "No person or persons shall hold any public meeting or meetings of any character upon any of the streets of the city or within any of the city parks without first obtaining permission in writing from the Mayor or from a majority of the city councilmen."

Section 2 provides for punishment for a violation of Section one.

Anderson demands his discharge upon the ground that the ordinance is invalid because it is unreasonable, "prohibits the exercise of free speech in the places named therein, is a restraint upon personal liberty," and because it permits certain city officials to discriminate between individuals possessing the same qualifications, rights and privileges as citizens.

This discretion vested in the Mayor or a "majority of the city councilmen" is uncontrolled by any definite and reasonable terms upon which the permit may be granted. Those officials are empowered to grant or withhold permission to hold meetings in the streets or parks of the city without inquiring into the character of persons applying for permit, the purpose of the meeting or assembly, nor its effect upon the business, traffic or peace and quiet of the city, but may for reasons entirely personal grant permission to any person and withhold it from another, and as the religious or political proclivities of the head

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of the city administration changes he may grant permission to a representative of one sect and deny it to another, withhold permission from a person of one political faction and grant it to another of different persuasion. Public meetings upon the streets or parks of a city are not necessarily productive of disorder, nor are they so likely to produce danger as to be *per se* producers of public disturbances, nor may they be said to be *per se* nuisances.

The ordinance recognizes this to be true, but it does not fix and determine the conditions applicable alike to all applicants under which meetings may be lawfully held. It merely leaves it to the uncontrolled discretion or caprice of the Mayor or a majority of the city councilmen. Such an ordinance is unreasonable and void. See *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. Rep. 359; *Anderson v. City of Wellington*, 40 Kan. 173, 19 Pac. Rep. 719, 2 L. R. A. 110; *State ex rel. Garrabed v. Dering*, 84 Wis. 585, 54 N. W. Rep. 1104 *In re Frazee*, 63 Mich. 396, 30 N. W. Rep. 72.

The charter of the city, which is Chapter 7219, Laws of Florida, Acts 1915, does not contain any provision definitely and specifically empowering the city to prohibit public meetings in the streets or parks of the city, nor to prohibit parades with or without music from passing through the streets without a permit from some city official. The city's power over such movements or assemblies exists where they create public disturbances or operate as nuisances, or create or threaten some tangible public or private mischief. See 19 R. C. L. 849.

The charter provides in general terms that the city may pass ordinances not in conflict with the Constitution of the United States or the Constitution and Laws of the

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State, and may exercise such powers and privileges as may be conferred upon cities and towns incorporated under the general law for the incorporation of cities and towns, which authorizes the passage of ordinances for the preservation of the public peace and morals for the suppression of riots and disorderly assemblies and for the order and government of the city or town.

The ordinance in question prohibits "any public meeting or meetings of any character upon any of the streets of the city," etc. It is only when meetings, political, religious, social or of other character, create public disturbances, operate as nuisances, threaten some tangible public or private mischief, prevent the passage of persons to and fro, obstruct traffic or prevent the free use of the streets to the public, that they may be restricted under charter provisions similar to the one under consideration.

The case of *Fitts v. City of Atlanta*, 121 Ga. 567, 49 S. E. Rep. 793, 67 L. R. A. 803, appears to hold to the contrary, but an examination of that case shows that the ordinance rested upon a charter provision authorizing the city by ordinance to regulate "public meetings and public speaking in the streets of said city of Atlanta by preventing the obstruction of the streets of said city or the gathering of disorderly crowds in said streets." The view we have of the ordinance under consideration is that it is supported by no express legislative authority, nor is there any implied power granted to the city to vest in any of its officials such arbitrary and uncontrolled discretion in the matter of restraining or permitting the holding of what may be a perfectly legitimate, lawful and beneficial meeting interfering with the rights of no other person and productive of no mischief, danger or disturbance.

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All laws and regulations to be valid for any purpose must be capable of construction, but this ordinance is incapable of construction. If Mr. B. is Mayor the meeting may be had; but if Mr. C. is Mayor it may not be. In the one case it may be an offense, in the other not. It makes it possible for an official in the name of law to violate recognized principles of legal and equal rights. In some municipalities governed by what they claim to be a superior system for regulation of municipal affairs, the entire business portion of the principal streets are so completely given over to use by the owners of a certain class of vehicles for parking and repairs as often to block the streets and render the use of them by the public often impossible and usually difficult and dangerous. In comparison with such practice it would seem that a meeting of a few citizens upon a street corner to discuss some social, political or religious topic would be too insignificant to be noticed.

The ordinance is void for unreasonableness. The prisoner is unlawfully restrained of his liberty, and it is ordered that he be forthwith discharged from custody of the respondent.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

BROWNE, C. J., not participating.

Ayers et al. v. Hope et al.—Decision of Court.

ALDA AYERS AND HER HUSBAND, JOHN DAVID AYERS, *Appellants*, v. HENRY B. HOPE, CAROLINE A. O'BERRY, AND HER HUSBAND, JOHN L. O'BERRY, LINTON DANIELS, SOLE HEIR-AT-LAW OF DALLY DANIELS, NANCY O. PRITCHARD, WIDOW, *Appellees*.

Decision Filed August 3, 1920.

An Appeal from a Decree of the Circuit Court Within and for the County of Hernando; W. S. Bullock, Judge.

Strauss L. Lloyd, for Appellants;

Hugh Hale, for Appellees.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Decree aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Decree; it is, therefore, considered, ordered and adjudged by the Court that the said Decree of the Circuit Court be, and the same is hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

F. E. C. Ry. Co. v. Peters—Syllabus.

FLORIDA EAST COAST RAILWAY COMPANY, *Plaintiff in Error*, v. THOMAS J. PETERS, *Defendant in Error*.

Opinion Filed August 4, 1920.

1. In an action against a common carrier for special damages on account of the loss of tomatoes because of delay in transporting crate material which was to be used in packing the tomatoes for shipment the plaintiff should allege and prove that at the time of the shipment of the crate material the carrier had notice that special damages to the consignee would result from a negligent failure to transport the crate material with reasonable promptness.
2. In an action against a common carrier for special damages resulting to the plaintiff because of the negligent delay in the transportation of carrier crates to be used in shipping tomatoes and such damage consists of the spoiling of tomatoes in the field which became too ripe for shipment, the plaintiff should show that he had made reasonable provision for the shipment of the tomatoes by delivering to the carrier for transportation a sufficient quantity of crate material for use by him at the time when the tomatoes were ready for shipment.
3. A party is bound by the allegations of fact in his own pleading, and when there is no denial of such allegations they are accepted as true if material and that meaning ascribed to the words that is usually intended by the use of such words.
4. An allegation in a declaration for special damages accruing because of the negligent failure to deliver crate material for use in shipping tomatoes which asserts that when the tomatoes become ripe and ready for packing and shipping they must be "packed and shipped immediately" to prevent them from becoming overripe and reaching the market in a deteriorated and unmarketable condition, will be construed to mean that when ripe and ready for packing and shipping they must be packed and shipped without delay.

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A Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Judgment affirmed if remittitur entered.

Brown, Twyman & Scott, Shutts & Bowen and Scott M. Loftin, for Plaintiff in Error;

James M. Carson, for Defendant in Error.

ELLIS, J.—Action was begun in the Circuit Court for Dade County by the defendant in error against the Florida East Coast Railway Company, plaintiff in error here, in September, 1911, to recover special damages alleged to have been sustained by the plaintiff by reason of the railroad company's alleged negligent failure to transport certain "carrier crates" from Jacksonville to Peters Siding on the line of the company's railroad in Dade County, with reasonable dispatch. A judgment for the plaintiff in the sum of \$39,180.63, including principal, interest, and costs was reversed. See *Florida East Coast R. Co. v. Peters*, 72 Fla. 311, 73 South. Rep. 151. Thereupon another trial was had upon issue joined upon pleas to the plaintiff's second amended declaration and a verdict was rendered for the plaintiff in the sum of \$44,460, with interest from the date of the action. The judgment entered upon that verdict was also reversed. See *Florida East Coast R. Co. v. Peters*, 77 Fla. 411, 83 South. Rep. 559.

In June, 1919, the case came on again for trial upon the issue joined between the parties, and there was a verdict for the plaintiff in the sum of \$50,000.00, and interest from September 22, 1911, upon which judgment was entered.

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The first verdict was for \$30,000.00 damages and interest from September 22, 1911. The defendant seeks a reversal of the last judgment and assigns fifty-nine errors.

When the case came on for trial in June, 1919, the plaintiff had abandoned the first ten counts of his declaration and materially amended the last or thirty-first count by striking out certain allegations. These amendments were in fact made four or five days before the verdict was rendered upon the second trial although the thirty-first count as copied in the opinion in the case as last reported contains much of the matter which was eliminated before that trial.

The thirty-first count as it stood after the amendments, was a composite count in that it comprehended all the material allegations which were made the bases of counts numbered from eleven to thirty inclusive.

It is alleged that the plaintiff having a large tomato crop made provision for shipping the tomatoes as they became ready in the field for picking, packing and shipment by ordering seventy-five thousand "carrier crates" to be prepared for him in Jacksonville and to be shipped over the defendant's railroad in accordance with shipping directions to be given by the plaintiff. According to the declaration after it was amended by eliminating the first ten counts and striking out many of the allegations of the thirty-first count, the plaintiff ordered shipped only fifty thousand "carrier crates." The crates were shipped so it is alleged in car lots of twenty-five hundred crates to each car. On March 16th, he ordered three cars shipped, on the seventeenth two cars, on the eighteenth one car and every day thereafter to and including the 27th, two cars, except on the 19th and 26th when no cars

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were ordered, the plaintiff had on hand enough carrier crates in which to pack and ship early shipments of tomatoes which might become ripe and ready for shipment before the carrier crates ordered from Jacksonville should arrive if transported by the defendant with reasonable speed and diligence.

It is alleged that the defendant had knowledge that when tomatoes become ripe and ready for packing and shipping, that they must be packed and shipped *immediately* to prevent them from becoming overripe and thus reaching the market in a deteriorated and unmarketable condition; that the plaintiff would during the busy season require a large number of "carrier crates" to-wit: five or six thousand each day in which to pack tomatoes which ripened and became ready for shipment; that the defendant had notice that the carrier crates which were offered to it for transportation consigned to plaintiff were to be used for the purpose of packing and shipping tomatoes grown on plaintiff's farm near Peters Station; that a failure to deliver them promptly would result in the loss of a large number of tomatoes. That the busy season for shipping tomatoes extended from about the middle of March to about the middle of April.

The thirty-first count also alleges that the defendant had notice that the plaintiff had employed a large force of workmen and teams to pack and ship the tomatoes and that this force of men and teams would be idle and become very expensive to plaintiff to maintain if the crates were not delivered promptly. This allegation, however, is not important as an element of damages as the plaintiff seeks only damages for the loss of tomatoes which became overripe and unfit for shipment while waiting for crate material which he had ordered from Jacksonville

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and which the defendant after receiving for shipment negligently failed to deliver within a reasonable time. There is also an allegation to the effect that the plaintiff had applied to the defendant to increase the length of its side track at Peters Station and thus aid in expeditiously "receiving material and shipping such tomatoes as might be packed and offered for shipment;" that if crate material was not delivered promptly and the force of men and teams became disorganized and "difficult, if not impossible" to reassemble a large quantity of tomatoes would become overripe and unfit for shipment because of a lack of men and teams to handle the tomatoes as they became ripe, even though material might after such disorganization arrive in sufficient quantity. It is also alleged that tomato vines are of such nature that their vitality and productiveness become very much impaired if tomatoes are not picked therefrom as soon as they become ripe and such injury is shown not only in a reduction of the quantity but also size and quality of the vine's fruit.

These allegations as to the number of men and teams employed and the likelihood of a disorganization of working force and the nature of the tomato vine and its deterioration under certain conditions and the necessity for ample facilities for speedy shipment, may not be considered as an element of damages, because damages from that source are not alleged to have occurred nor are damages claimed on that account, but they did serve to inform the defendant of the precarious, uncertain, doubtful and extremely exacting nature of the business in which the plaintiff was engaged requiring on his part precise, methodical and most continuous and prudent management in every department, including ample pro-

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vision for crate material and baskets both in quantity and time allowance for transportation, which of course the plaintiff well knew.

It is alleged that the defendant received in Jacksonville for transportation to the defendant the "crate material" in the quantities and upon the dates mentioned, but did not transport the material with *reasonable dispatch*, but on the contrary greatly delayed the transportation and delivery of the same, which delay in transportation and negligence on the part of the defendant was the cause of great damage and loss to the plaintiff, "to-wit, ninety-three thousand (93,000) crates of tomatoes" of the "net value to the plaintiff of, to-wit, one dollar and thirty-five cents (\$1.35)" for each crate of tomatoes. It is alleged that this great quantity of tomatoes "became overripe and rotted in the field of the plaintiff because the plaintiff had no "carrier crates" in which to pack and ship the same. So it appears from the plaintiff's declaration that if there had been no complaint against the defendant about the transportation of the fifty thousand crates, the plaintiff would nevertheless have suffered the loss of forty-three thousand crates of tomatoes for the shipment of which there was no provision.

The first assignment of error rests upon the court's order in overruling the defendant's motion for a new trial, the first eight grounds of which attack the verdict as contrary to the law, the evidence and the charge of the court, and as being excessive.

The pleas interposed to the declaration were not guilty and a special plea which in substance averred that from the beginning of the tomato shipping season up to March 23 the plaintiff did not exhaust his supply of crate

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material, nor did he ship to the full amount of his supply on hand up to March 23rd. That thereafter, on March 30th, the plaintiff received large quantities of crate material, which supply exceeded at all times any amount shipped on any date thereafter; that if the plaintiff suffered any damage by reason of the defendant's failure to deliver any crate material, the damage was measured by the market price of the tomatoes from March 23rd to March 29th, 1911, both inclusive, nor would it exceed for that period the amount of carrier crates ordered out from Jacksonville to be delivered between the days of such period. Issue was joined by the plaintiff upon these pleas. The questions presented by the pleadings therefore were:

1st. Was the defendant negligent in delaying the transportation of any crate material delivered to it in Jacksonville consigned to plaintiff for transportation between March 16th and 27th, both inclusive, and in respect to how many car loads of such material was it so negligent?

2nd. What is a reasonable time to be allowed for the transportation of crate material in car lots from Jacksonville to Peters' Station?

3rd. Had the plaintiff himself made reasonable provision for the shipment of the quantity of tomatoes which he claims to have lost and for which he seeks damages on any day during such period, by causing to be delivered to the defendant at Jacksonville for transportation to the plaintiff a reasonable time prior to any such day of sufficient "crate material" and providing himself with other necessary material for shipping the quantity of tomatoes claimed to have been lost on that day?

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4th. Did the plaintiff ship to the full amount of his crate material on hand up to March 23rd?

5th. Did the defendant have notice of the conditions as alleged in the declaration and special damage that would result from negligent failure to deliver the crates?

6th. What was the market value each day of the tomatoes in the plaintiff's field which there became overripe and unfit for shipment and were lost because of defendant's negligence in delaying the transportation of crate material

The damages which the plaintiff sought was the value of the tomatoes lost on account of defendant's alleged negligence, as measured by the market price per crate. As he only made provision for fifty thousand crates his damages of course must be confined within that limit, for it is clear that he cannot ask for damage that resulted from his own inattention to the demands of his own business. It might even be said with propriety that it was the plaintiff's duty, knowing the precarious, uncertain, doubtful and extremely exacting nature of his business to have allowed ample time for the transportation of his crate material; that is to say prudence would seem to have required that he should have caused crates to be delivered to the railroad for transportation to him at such time as would allow a margin of at least a few hours more than a reasonable time for transportation of ordinary freight, and if delay in the transportation of the crate material was likely to be the proximate cause of disastrous consequences in the form of special damages as alleged in the declaration the plaintiff should have previously given notice to the defendant company of the special damage that would result from an unreasonable

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delay in the transportation of such material unless the carrier was already in possession of such knowledge. See Florida East Coast R. Co. v. Peters, 72 Fla. 311, text 376, 377, 73 South. Rep. 151.

It was the violation of this principle in the admission of evidence and the giving of instructions on the first trial of this case that necessitated a reversal of the judgment. A principle of law which appeals alike to both reason and conscience and surely is not very difficult to comprehend.

In applying this principle to the case as it is now presented we find nothing in the record to show that the defendant had any information from the plaintiff or from any other source, previous to March 16th, that an unreasonable delay in the transportation of the crate material would result in the special damage alleged to have followed; nor do we find any evidence to justify the finding that such notice was received by the carrier prior to the receipt by it that day of the seven thousand five hundred crates that day shipped to the plaintiff. On the question of what may be considered under the circumstances a reasonable time for the transportation of such freight in car lots from Jacksonville to Peters Station a point on the line of railroad about miles from Jacksonville there is possibly some evidence from which the jury might have concluded that two days was a reasonable time. The testimony of the defendant in error was that two days was about 22 hours longer than the defendant's schedule and was a reasonable time for the transportation of such material between the two points, although his experience with the defendant in such matters was that there was some variation from that limit up to as much as three days. The plaintiff should have

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been guided by this experience when ordering crate material to be delivered to the railroad for transportation to him rather than to have relied upon the railroad's published schedule, thereby risking a great loss because of each carload of material delayed, because one should take every reasonable means to avert loss and prevent injury rather than shift the entire responsibility to others, but we assume nevertheless that two full days were considered by the jury to be sufficient under the circumstances for the transportation of the freight mentioned.

Allowing two days for transportation of the material, the period during which damages were recoverable extended from the nineteenth to the thirtieth of March, 1911, according to the declaration, because material shipped on the 16th should have been ready for delivery on the 19th because an arrival on the 18th would have satisfied the reasonable time allowance.

No recovery should be allowed for loss on the 19th because no notice was shown to have been given the defendant of the special conditions under which the shipment of the 16th was made prior to the issuing of the bill of lading for those cars. No recovery should be allowed for damages accruing on the 22nd because no cars were ordered out on the 19th, and no provisions made by him for packing tomatoes that day in crates handled by the defendant; for the same reason no recovery should be allowed for loss accruing on the 29th, as no cars were ordered to be shipped on the 26th and no recovery should be allowed for loss accruing on the 30th because material arrived on that date greater in quantity than was ordered on the 27th. The number of crates therefore which according to the evidence were delayed in transportation and because of which the plaintiff may recover was 37,-

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500. The verdict to which the plaintiff was entitled was the sum of each day's damages accruing between the 20th and 28th, both inclusive, excluding the 22nd, provided each day's damages should be limited by the number of crates which plaintiff had provided for that day's use by ordering the shipment of material from Jacksonville a reasonable time before such date. If it is true as alleged in the plea that up to and including the 22nd of March the plaintiff did not utilize all of the crate material which he had on hand, he should not recover the full measure of loss accruing on the 20th and 21st, but such loss should be reduced so far as defendant's liability is concerned by the number of crates unused on those dates up to the number which plaintiff had shipped on the 17th and 18th, which, according to the evidence, amounted to three carloads, two ordered on the 17th and due for delivery on the 20th and one on the 18th due for delivery on the 21st. No cars, as above stated, were ordered out on the 19th, consequently no damages could be recovered for loss accruing on the 22nd.

The action is one upon the case for special damages resulting to the plaintiff because of the negligent delay in the transportation of freight in twenty separate shipments, therefore the burden was upon the plaintiff to show the special damage resulting to him from the defendant's negligence in handling each shipment, and as that damage consisted as alleged in the declaration in the spoiling of tomatoes in the field because there were no crates in which to pack the tomatoes and the picking of them would be an unnecessary expense the plaintiff should show the quantity of tomatoes which ripened and spoiled from day to day and not add one day's injury to another and estimate the total damage to be

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equivalent to the number of crates which were ordered for the entire period. According to the stipulation, between counsel which was filed in evidence the plaintiff shipped between February 25th and March 22nd inclusive by freight and express 25,040 crates of tomatoes. There is no evidence in the record to show that at the close of business on the 22nd day of March how much crate material was on hand nor how many crates of tomatoes were left unpacked for lack of material. The evidence does show, however, that on the 26th of March Mr. Britt, in company with Mr. James, Mr. McLane and Mr. Carson, at the request of the plaintiff, went over the latter's "crop of tomatoes of about four hundred acres" and made a "very careful estimate of the tomatoes in the field at the time." They made their estimate of the quantity of tomatoes that day ready for picking by selecting "an average row" in each tract and picking the tomatoes from that row and putting them in carrier crates and then estimating the number of crates of tomatoes in the tract according to the number of rows in it. This process was followed as to each tract in the entire field of four hundred acres. Adding to the quantity found in the field to be ready for shipment the tomatoes already picked and put in the warehouse there were fifty-eight thousand and forty-four crates of tomatoes. This quantity the evidence showed to be ready for shipping.

What proportion of this large quantity of tomatoes was ready for shipment four or five days earlier when the plaintiff had some crates on hand, or what proportion was actually shipped afterwards is not shown. The stipulation shows that except 101 crates there were none shipped from the 24th to the 30th inclusive. But during the period from March 19th to the 26th the plaintiff provided for only 32,500 crates if the five thousand are

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counted which were shipped on the 24th and were not due for delivery before the 27th. The plaintiff merely showed that on the 26th of March there was a large quantity of tomatoes on hand which were ripe and ready for shipment and left the jury to surmise that if the crating material which he had ordered had been delivered with reasonable dispatch he could have shipped 50,000 crates of tomatoes, notwithstanding he had made provision for only 32,500 crates, and that the necessary baskets were included in this material. Mr. Britt, a witness for the plaintiff, explained that a "carrier crate consists of two heads, two slats for the bottom and two slatted sides and one solid cover for the top." That makes the crate said he and "on the inside of that crate we have six baskets and there is a division strip to go in between the top and bottom row of baskets to keep the top ones from mashing the lower ones, and then the other three baskets you sit right on top of this strip. It takes six baskets to make this crate complete. That is you have to have six carrier baskets to go in this crate." The evidence also shows that on March 26th the plaintiff was short of baskets. If the crates had been on hand they would, it seems from this evidence, have been useless without the baskets, but whether they were a part of the crate material shipped from Jacksonville is not clearly shown. The parties, however, seem to consider the baskets as part of the crate material, and we will also, although if they were not the loss to plaintiff, was not entirely due to the defendant's failure to deliver the crates within a reasonable time. How can it be said that the defendant was liable at all if the plaintiff had failed to provide himself with the necessary baskets? For, according to Mr. Britt, if the shipper had no baskets the crates would be of no service. If the baskets were necessary to a shipment of tomatoes yet formed

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no part of the "carrier crates" loaded in each car at Jacksonville for shipment to the plaintiff: then the failure to deliver the carrier crates within a reasonable time was not the proximate cause of the injury, the plaintiff's own negligence in not making provision for the baskets was the contributing cause of the injury, which he sustained.

Because of these insufficiencies in the evidence the jury could not have arrived at the conclusion they reached solely upon the evidence before them. There were necessary elements in the case lacking in the proof and it is the duty of this Court to reverse or modify the judgment.

The measure of damages in this case is discussed in the second opinion, 77 Fla. 411, 83 South. Rep. 559, where the method of arriving at the value of the tomatoes alleged to have been lost is clearly pointed out by Mr. Justice Whitfield.

The refusal of the court to give the charge requested by the defendant and lettered "C" is not available as a ground for an assignment of error because no exception was taken to the refusal at the time; besides the point presented by such requested instruction was covered in other charges which the court gave.

Under the first and fifty-eighth assignments of error counsel for plaintiff in error contend that as the evidence showed that the plaintiff had on hand on certain days during the shipping season supplies of unused crate material he could not recover damages resulting from a failure to use such material because of a lack of cars in which to ship the tomatoes.

Plaintiff's counsel in examining the plaintiff as a witness in his own behalf did bring out the fact that between the 15th and 23rd of March the plaintiff had packed

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crates of tomatoes in his packing house which he was compelled to carry over night from time to time because he could not get cars in which to load them and was compelled to ship them in any kind of cars he could get, but all the crates that arrived between the 16th and 26th of March were packed and shipped out with tomatoes.

It does not appear therefore that any damages were claimed on account of injury to the tomatoes because of the necessity of keeping them in the packing house for lack of cars. The plaintiff offered evidence to show that on March 26th he had on hand fifty-eight thousand and forty-four crates of tomatoes in the field and packing house which it is claimed were ruined for lack of "carrier crates" in which to ship them. Mr. Britt, however, said that some of them were in carrier crates with *three* baskets in the bottom and "not in the top" by which is probably meant that the "carrier crates" on hand were only partially packed. He also said there were not enough baskets to make a good crate.

The plaintiff also testified that he lost tomatoes between the 16th and 26th of March which became overripe in the field and that the 5,000 or 7,500 crates of tomatoes in the packing house rotted during "those ten days." The former he said were not included in the estimate made on March 26th. Now as the plaintiff had made provision according to his declaration for 40,000 crates to be delivered to him by defendant up to March 26th he could recover damages for as many crates of tomatoes lost by becoming over-ripe as he had made *complete* provision for shipping, and if any portion of those tomatoes could have been safely carried over until the 27th, 28th and 29th, he could recover damages for their loss because of failure to deliver within reasonable time the "crates" ordered out

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on the 25th and 27th, assuming that the latter shipment was due on the 29th early enough in the day to use the crates. Such proof would undoubtedly have completed his case so far as the defendant's liability on fifty thousand crates of tomatoes was concerned on which amount the jury seem to have based its verdict. But as we have undertaken to point out the evidence did not show that the defendant had notice of the special damages that might accrue from any failure on its part to deliver crates promptly before the shipment of 7,500 crates on the 16th and that as to that shipment the notice did not apply although it did to all the others; that as the shipments of the 24th, 25th and 27th aggregating 15,000 crates were not due until the 27th, 28th and 30th there could be no recovery on account of the delay in delivery of those crates unless it was shown that tomatoes on hand on the 26th could have been carried over safely to those dates, which could not be inferred as the declaration alleged specifically that the tomatoes when ripe had to be shipped immediately to prevent rotting in the field; that as there were no crates ordered on the 26th for delivery on the 29th, tomatoes that would not have lasted beyond the 28th could not become a factor in the estimated damages on account of the failure to promptly deliver the shipment of the 27th of March, and that there was no evidence to show that "crate material" referred to in the stipulation and bills of lading included baskets, six to each crate. In that state of the evidence the jury could not reasonably have concluded that the damage sustained was any amount whatever the value of a crate of tomatoes might have been. And if "crate material" includes baskets so that the defendant received for transportation to plaintiff 1,500 baskets with each car of crate material the verdict could not have been for \$50,000.00 even if the value of the

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tomatoes lost in the field and packing house was shown to be one dolar per crate.

But as the parties seemed to agree that "baskets" used in shipping tomatoes were included in the "crate material" received by the defendant for transportation we will so regard the evidence and order the entering by plaintiff of a remittitur within ten days of \$22,500.00 and interest to be calculated on that amount from September 22, 1911; otherwise the judgment stands reversed.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

BROWNE, C. J., not participating.

MINNIE G. RAWLINS, *Appellant*, v. THE DADE LUMBER
COMPANY, *Appellee*.

Opinion Filed June 23, 1920.

Petition for Rehearing Denied October 14, 1920.

1. Under Sections 1 and 2 of Article X of the Constitution, if the head of a family residing in this State is the owner of a homestead as defined by the Constitution, at the death of such owner, "the exemptions provided for shall inure to the widow and heirs" if the owner be a married man. The statute prescribes who are to be the "heirs" and what interests or rights in "the exemptions provided for in" the Constitution "shall inure to the widow and heirs of the party entitled to such exemption."
2. As to real estate other than a homestead, the "*children and their descendants*" of a male parent are his "heirs;" Section 2295, General Statutes of 1906; but as to the home-

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stead real estate, *if there are no children* of the owner of a homestead at his death, and he leaves a wife surviving him, she takes the entire property.

3. Where the husband who lived on his homestead with his wife, they having no children, leaves his wife on the homestead and lives elsewhere in the same town, the wife remaining on the homestead, and the husband executes a deed of conveyance of the homestead to the wife, such conveyance may be a relinquishment to the wife of the husband's rights in the homestead, there being no children to whom the homestead could "inure" as heirs of the husband, and the homestead may be exempt from the lien of judgments obtained against the husband after the relinquishment by conveyance to the wife. In such a case if the homestead rights have been lost, the conveyance to the wife for a sufficient consideration would give her a title to the exclusion of the liens of judgments obtained against the husband after the conveyance to her, there being no fraud.

An Appeal from the Circuit Court for Broward County;
E. B. Donnell, Judge.

Decree reversed.

G. A. Worley & Son, for Appellant;

Evans & Bell, for Appellee.

WHITFIELD, J.—From the transcript herein, it appears that on July 1st, 1916, C. B. Rawlins and his wife, Minnie G. Rawlins, occupied as their home in the town of Fort Lauderdale, Florida, a house on a lot owned by the husband. They had no children. The house was on Lot 7, but contiguous thereto were Lots 3 and 5, all in "Lot Three of Subdivision of Block (56) in the Town of Ft. Lauderdale, Florida," all the lots being owned by the

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husband and in area less than one-half acre. On July 1st, 1916, the husband left his wife and subsequently took up his abode at his brother's home in the same town, leaving the wife occupying the homestead alone, which she continued to do, a lady companion being with her a part of the time. In October, 1916, the husband brought suit for divorce. On June 30th, 1917, the husband alone executed to the wife a deed of conveyance of the homestead real estate described above, including also other property not material to be considered here. In August, 1917, a divorce was granted to the husband. On October 27th, 1917, C. B. Rawlins executed to Minnie G. Rawlins an instrument stating "that whereas the said C. B. Rawlins and Minnie Rawlins were, on the 30th day of June, A. D. 1917, man and wife, and whereas at said time there was a divorce suit pending between the said parties, to-wit, C. B. Rawlins and Minnie Rawlins, and whereas the same was being contested and a claim by the said Minnie Rawlins interposed for suit money, attorney's fees and permanent alimony, and whereas the said parties previous to the said 30th day of June, A. D. 1917, arrived at a settlement or agreement to be considered a marriage settlement whereby certain property was to be deeded by the said C. B. Rawlins to the said Minnie Rawlins in lieu of alimony, suit money, and attorney's fees, and in full settlement of all claims of alimony or other kinds, and in full and complete understanding having been arrived at by the parties and agreement made, the said C. B. Rawlins did, on the 30th day of June, A. D. 1917, by deed convey to the said Minnie Rawlins described property,

* * * which said property was transferred for the consideration aforesaid, which said deeds were duly acknowledged, signed, sealed and delivered, * * * and whereas the said deeds did not relate the fact that

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the said C. B. Rawlins and Minnie Rawlins were husband and wife, and deeded to the said Minnie Rawlins as a marriage settlement; now, therefore, this deed is made for the purpose of making clear upon the records the true meaning and intent of the deeds heretofore referred to, and for the purpose of making a complete and absolute title to the said property in the said Minnie Rawlins."

In March, 1918, a judgment was recovered against C. B. Rawlins for a pre-existing indebtedness, and the levy of an execution following the judgment upon the lots conveyed on June 30th, 1917, by C. B. Rawlins to his then wife was enjoined at the suit of the grantee brought against the sheriff and the judgment creditor of C. B. Rawlins. Subsequently, after various proceedings had in the suit not material on this appeal, the chancellor dissolved, and on a rehearing granted again dissolved the injunction as to the described homestead real estate, and from the latter order Minnie G. Rawlins appealed on June 23, 1919. On July 3rd, 1919, the bill of complaint was dismissed, but no appeal therefrom appears.

The pertinent organic and statutory provisions are as follows:

"Section 1. A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from the sale for taxes or assessments, or for the payment of obligations contracted for

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the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. The exemption herein provided for in city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this article.

“Section 2. The exemptions provided for in Section One shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section.” Secs. 1 & 2, Art. X, Const.

“Whenever a person who is the head of a family residing in this State, and having his homestead herein, shall die and leave a widow surviving him, but no children, the homestead shall descend to the widow and shall not be the subject of devise by last will and testament; but if there be any child or children surviving him, then the widow shall be entitled to dower or a child's part in such homestead, as she may elect to take a child's part, in other cases, and should she not elect to take a child's part, she shall be confined to dower in such homestead property; but she may take under the will, such other property as may be given to her thereby or dower therein as she may elect.” Sec. 2297, Gen. Stats. 1906.

Under Sections 1 and 2 of Article X of the Constitution, if the head of a family residing in this State is the owner of a homestead as defined by the Constitution, at the death of such owner “the exemptions provided for shall inure to the widow and heirs” if the owner be a married man. The statute prescribes who are to be the “heirs” and what interests or rights in “the exemptions

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provided for in" the Constitution "shall inure to the widow and heirs of the party entitled to such exemption."

There being no children, the wife, under the statute, Section 2297, would be the sole heir and beneficiary thereof had the husband died owning the homestead; and the moving away and the conveyance by the husband to the wife were but a relinquishment of his rights in the property that had been the homestead in favor of the sole beneficiary thereof. See *Jetton Lumber Co. v. Hall*, 67 Fla. 61, 64 South. Rep. 440; *Montgomery v. Dane*, 81 Ark. 154, 98 S. W. Rep. 715, 118 Am. St. Rep. 37; 13 R. C. L. 633.

The rights of the former wife in the property are to the exclusion of creditors of the husband who obtained judgment against him after the relinquishment by conveyance to the former wife, she remaining in possession of the homestead property from the time the husband left the wife and the home place to live at another place in the same city. The instrument of October 27th, 1917, merely stated added considerations for the relinquishment of the husband's rights. This holding does not conflict with previous decisions that a conveyance of the husband's homestead to the wife by a deed executed by the husband alone is void when there are "heirs" of the husband entitled to rights in the homestead. *Byrd v. Byrd*, 73 Fla. 322, 74 South. Rep. 313.

Homestead rights inure to the widow and heirs of the owner of the homestead who must be *the head of a family residing in this State*. It is for this reason that when there are children or a child of the husband a conveyance of homestead real estate to the wife by the husband alone is void under the Constitution prescribing the method by which homestead real estate may be alienated.

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If the husband is the head of the family and conveys his homestead real estate to his wife, the homestead rights may be thereby affected to the detriment of the heirs of the head of the family, unless the husband has no children.

As to real estate other than a homestead, the "*children and their descendants*" of a male parent, are his "heirs"; Section 2295, General Statutes of 1906; but as to the homestead real estate, *if there are no children* of the owner of a homestead at his death, and he leaves a wife surviving him, she takes the entire property. Sec. 2297, Gen. Stats. 1906.

Even if the appellant had no homestead rights in the property, then the conveyance to her was for a consideration sufficient in law to give her a title to the exclusion of the creditors of C. B. Rawlins who obtained judgment after the conveyance to appellant, no fraud appearing. Sec. 2457, Gen. Stas. 1906.

The sheriff was not a necessary party to test the correctness of the order appealed from. Even though no supersedeas order was obtained on the appeal herein and the sale which the complaint sought to enjoin has taken place, the appeal should not for that reason be dismissed as substantial property rights are involved that may not be destroyed by an illegal execution sale. A dismissal of the bill of complaint when this appeal was pending was improper.

The decree appealed from is reversed.

BROWNE, C. J., AND TAYLOR, J., concur.

ELLIS AND WEST, J. J., dissent.

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THE FLORIDA NATIONAL BANK OF GAINESVILLE *et al.*, Appellants, v. J. W. SHEROUSE, Appellee.

Opinion Filed June 24, 1920.

Petition for Rehearing Denied October 14, 1920.

1. The findings of a Chancellor upon the evidence will not be disturbed unless such findings are clearly shown to be erroneous; but if a decree is manifestly against the weight of the evidence or contrary to the legal effect of the evidence, then it becomes the duty of the appellate court to reverse such decree.
2. In the very nature of the case, fraudulent intent must usually be shown by circumstantial evidence, and circumstances altogether inconclusive if separately considered may, by their number and joint consideration, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.

An Appeal from the Circuit Court for Alachua County;
J. T. Wills, Judge.

Decree reversed.

E. G. Baxter, for Appellants;

W. S. Broome, for Appellee.

REAVES, Circuit Judge.—J. W. Sherouse, whom we shall herein call the complainant, filed his bill in the Circuit Court for Alachua County against the Florida National Bank of Gainesville and the Sheriff of said county, alleging that a described sixty acres of land, the property of complainant, was about to be sold on execution to satisfy

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a judgment recovered by the Florida National Bank against C. C. Sherouse.

The prayer of the bill is that the threatened sale of said lands be temporarily and permanently enjoined.

The bank answered, admitting that it had recovered and then held a judgment against C. C. Sherouse for the sum of \$2,630.80, and denying that the complainant was the owner of the described lands, but, on the contrary, alleging that said lands were the property of C. C. Sherouse and that two certain deeds thereof, the one made by C. C. Sherouse to his brother, L. A. Sherouse, and the other by L. A. Sherouse to their father, J. W. Sherouse, the complainant, were fraudulent and void as against the bank which was a creditor of C. C. Sherouse before said deeds were executed.

Whether or not said conveyances are fraudulent and void as against the said bank, the judgment creditor of C. C. Sherouse, is the ultimate question presented by the record. The Chancellor found for the complainant, and permanently enjoined the sale of the property under the said judgment. In view of said finding we have hesitated to reverse the decree because of the well-recognized principle of law that the findings of a Chancellor on the evidence will not be disturbed by the appellate court unless said findings are clearly shown to be erroneous. But if a decree is manifestly against the weight of the evidence or contrary to the legal effect of the evidence then it becomes the duty of the appellate court to reverse the same. *Newman v. Smith*, 77 Fla. 667, 82 South. Rep. 236; *Boyd v. Gosser*, 78 Fla. 70, 82 South. Rep. 758.

A very careful study of this case leads us to conclude that the decree is contrary to the legal effect of the evi-

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dence as disclosed by the record. It appears that C. C. Sherouse was an employee for many years of one A. L. Webb, that in 1912 Webb borrowed money from the bank and C. C. Sherouse endorsed the note, evidencing said loan, that the note was renewed from time to time until Webb finally became insolvent, and on August 17, 1916, he was adjudged a bankrupt. The endorsement of C. C. Sherouse was carried on each renewal of the note, and after the bankruptcy of Webb, Sherouse signed a further renewal as principal debtor, and finally, having failed to pay the note, judgment was recovered by the bank against him on March 5, 1918. On August 3, 1916, C. C. Sherouse conveyed the property in question, consisting of sixty acres of land, about twelve or fifteen acres of which was cleared and in cultivation with a dwelling house above the average in character for the community, and also a barn and out buildings thereon, to L. A. Sherouse. The deed recited a consideration of \$2,500.00, and was filed for record December 29, 1916. By deed dated December 28, 1916, L. A. Sherouse conveyed the same lands to their father, J. W. Sherouse, for a stated consideration of \$2,500.00, the deed being filed for record February 21, 1918. In neither case was the true consideration \$2,500.00, but the cancellation of alleged indebtedness then existing between the parties. The amount of such indebtedness, if it existed at all, is not definitely shown, but was certainly much less than \$2,500.00. J. W. Sherouse testified that he had sold the twenty acres to his son, C. C. Sherouse, several years before. He does not remember the exact date of said sale, but it was before 1910. He further says that his son, C. C. Sherouse, had never paid him but \$250.00 on the purchase price, and also that he loaned his son \$400.00 at the same time to buy the forty acres. When asked how much C. C. Sherouse was to pay him for the land he said he was not

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sure, but it was "about \$1,000.00, I think." He further says that C. C. Sherouse conveyed the property to L. A. Sherouse with the understanding that L. A. Sherouse would assume and pay the indebtedness due the complainant, but that L. A. Sherouse, having failed to pay the same, deeded the land to him, the complainant, in satisfaction of said indebtedness. In another place the same witness says that he let C. C. Sherouse have \$400.00 to pay for the forty and thinks he was to pay him "about \$500.00 for the twenty." This witness also says that he knew C. C. Sherouse had endorsed a note for Webb, and that he (C. C. Sherouse) owed the bank at the time the land was conveyed from C. C. Sherouse to his brother, L. A., and thence to the complainant. C. C. Sherouse testifies that he had paid his father only \$250.00 of the purchase price of the land, and that L. A. Sherouse paid him (the witness) nothing for the conveyance except that he had borrowed \$250.00 from L. A. Sherouse before that, and in consideration for the land L. A. Sherouse cancelled the indebtedness, and also assumed the indebtedness of C. C. Sherouse to their father, J. W. Sherouse. In answer to a question as to the amount of that indebtedness he said, "It would be \$900.00 less \$250.00 or thereabouts."

L. A. Sherouse did not testify, but J. W. Sherouse and C. C. Sherouse both say that no written evidence of indebtedness or of payment relating to said transactions at any time passed between any of the parties.

The evidence shows that the buildings on the property were worth, in 1916, \$1,150.00, and that the land, with the improvements, was worth \$2,300.00 or \$2,400.00. It also appears from the evidence that L. A. Sherouse had no property but was working as a common laborer at odd

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jobs, and that C. C. Sherouse had no property except the property in question at the time he made the deed in 1916. He does testify that he now owns a lot worth "about \$1000.00" which is encumbered for \$700.00, but does not know whether he owned it in 1916 or not.

It further appears that the deeds were witnessed by, and acknowledged before relatives of the grantors and grantees.

There is practically no conflict or consideration in the testimony of the various witnesses. The question before the Chancellor was whether the facts testified to show that the intent or legal effect of the transactions involved was to defraud the creditors of C. C. Sherouse. It seems clear that this inquiry should have been answered by the Chancellor in the affirmative; and, having failed so to do, it becomes the duty of this court to reverse the findings, notwithstanding that the question involved is one partly of fact. In the very nature of the case, a fraudulent intent must usually be shown by circumstantial evidence, and "circumstances altogether inconclusive, if separately considered may, by their number and joint consideration, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

Volusia County Bank v. Bigelow, 45 Fla. 638, 33 South. Rep. 704.

There are a multitude of circumstances in this case, which, to say the least, are calculated to create suspicion, and many of which are recognized badges of fraud. Among them are the close relation in point of time of the deed by C. C. Sherouse to his brother, L. A. Sherouse, dated August 3, 1916, to the bankruptcy of Webb, which was adjudged August 17th, 1916; withholding of said deed, and the subsequent deed from the record for a con-

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siderable period of time; the recital of a false consideration in each deed; the inadequacy of the actual consideration, assuming it to be true that there was, in fact, about \$700.00 due the complainant on the purchase price of said land as testified to; the conveyance by C. C. Sherouse of all or substantitally all his property, and his clear insolvency as a result thereof; no written evidence of indebtedness at any time given nor any written receipts showing payment at any time passing between the parties to the various transactions; the hazy and uncertain testimony of C. C. Sherouse and J. W. Sherouse as to the amount of indebtedness claimed to be owing by the former to the latter; the relationship of the parties and the knowledge each had as to the financial standing of C. C. Sherouse. The uncontradicted facts and circumstances prove fraud.

We deem it unnecessary to accumulate authority in support of our conclusion, but on the question of what constitutes badges of fraud see 20 Cyc. 439 *et seq.*; 12 R. C. L. 476 *et seq.*

For the reasons stated, the judgment should be reversed, with directions to the lower court to dissolve the injunction, and dismiss the bill.

PER CURIAM.—The record in this case having been considered by this Court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the Court as its opinion, it is considered, ordered and adjudged by the Court that the decree herein be, and the same is hereby reversed; and the cause is remanded with directions to the lower Court to dissolve the injunction and dismiss the bill.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

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THE STATE OF FLORIDA, *Appellant*, v. FLORIDA EAST COAST
RAILWAY, A CORPORATION, *Appellee*.

Opinion Filed June 24, 1920.

Petition for Rehearing Denied December 7, 1920.

The provision of Section 11, Chapter 6527, Acts of 1913, that "all suits under *this Act* shall be brought within two years after the commission of the alleged wrong or injury, except in cases where the Railroad Commissioners have heretofore been or shall hereafter be, by refusal of such railroad or common carrier to observe the rates, rules, schedules or regulations by the Railroad Commissioners, compelled to resort to suits to enforce such rates, rules, schedules or regulations, and in such cases suits for such loss, damage, or penalty may be brought within twelve months after the termination of such suits in favor of the Railroad Commissioners," does not apply to suits brought under Chapter 5616, Acts of 1907, "to compel" "accountings and payments" by common carriers for transportation charges collected from individuals in violation of rates fixed by the Railroad Commissioners under the statute. Such special statute of limitations not being applicable, the general statute of limitation was properly applied by the trial court in an accounting there being had pursuant to the provisions of Chapter 5616, Acts of 1907.

An Appeal from the Circuit Court for Duval County;
Daniel A. Simmons, Judge.

Order affirmed.

Dozier A. DeVane, for Appellant;

W. A. Blount and Scott M. Loftin, for Appellee.

WHITFIELD, J.—A suit was brought in the name of the State of Florida by the Railroad Commissioners, under

Chapter 5616, Laws of Florida, 1907, amending Section 2921, Chapter 5, General Statutes of 1906, to account for and adjust by payment overcharges collected from numerous persons for transportation of freight in violation of Rule 19 prescribed by the Railroad Commissioners. An order overruling a demurrer to the bill of complaint was affirmed by this court. *Florida East Coast R. Co. v. State*, 77 Fla. 571, 82 South. Rep. 136.

The Chancellor made the following order for an accounting:

“This cause coming on to be heard on this day, and it appearing to the court that the defendant has filed no plea or answer to complainant’s bill, as required by order of this court, made the 8th day of November, 1917, and the time for filing the same having expired; and thereupon on motion of complainant’s solicitor, it is ORDERED, ADJUDGED and DECREED that the said bill be taken as confessed.

“It is further ORDERED, ADJUDGED and DECREED that this cause be referred to Chas. S. Adams, Special Master in Chancery of this court, to take account of all dealings and transactions to which the complainant is entitled to relief in this case, for the better clearing of which account the defendant and its agents and employees are directed to produce before the said Master, upon oath, all bills of lading, waybills, books, papers, and writings in its or their custody or power relating thereto, including the names of all persons for whom the defendant has carried any commodity between the 22nd day of October, 1921, and the 15th day of November, 1916, subject to Rule 19, of ‘Rules Governing the Transportation of Freight,’ adopted and promulgated by the Railroad Commissioners of the State of Florida, as set forth in the

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bill of complaint herein, and the amount that the defendant has charged to each and every shipper or consignee of commodities subject to the provisions of said Rule 19, between the dates last aforesaid without making the reduction of ten and twenty per cent. provided and prescribed by said Rule, and are to be examined as the said Master shall direct; who in taking the said account is to make report upon the balances due separately to each and every shipper or consignee, to be paid over to the person to whom it is due in accordance with the statute in such cases made and provided and the further order of this court. And the court reserves the consideration of the costs of this suit, and of all other directions until after the said Master shall have made his report."

The complainant presented the following petition:

"The State of Florida, by Dozier A. DeVane, Special Counsel for the Railroad Commissioners of the State of Florida, by them designated to sue in their behalf, represents unto the court, that upon a bill of complaint filed in said cause on the 3rd day of April, 1917, an order and decree was entered by this court, requiring the defendant to account to the plaintiff for all overcharges collected by the defendant between October 22, 1912, and November 15, 1916, during which time the defendant disobeyed and disregarded Rule 19 of 'Rules Governing the Transportation of Freight.'"

"Complainant further represents unto your Honor, that an appeal was taken from the decree of this Honorable Court to the Supreme Court of the State of Florida, and by which appeal the decision of this court was affirmed by the said Supreme Court.

"Whereupon this matter coming on for accounting, in

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accordance with the decree of this court of December 14, 1917, the defendant has declined and refused to account for any overcharges collected by the defendant prior to April 7, 1914, and claims that all overcharges collected prior to that date are barred by the statute of limitations.

“WHEREFORE, your complainant prays an order of the court in the premises, directing the said defendant, the Florida East Coast Railway Company, to account to the complainant, as it is required to do by the decree of this court of December 14, 1917, for all overcharges collected by it between October 22, 1912, and November 15, 1916, during which time it disobeyed and disregarded Rule 19, as aforesaid.”

The Special Master appointed reported as follows:

“Comes now Charles S. Adams, Special Master in Chancery, and reports unto the court that on the 14th day of December, 1917, this Honorable Court made and entered a decree in the above entitled cause, directing the defendant, the Florida East Coast Railway Company, a corporation, to account to the complainant for all overcharges collected by it between the 22nd day of October, 1912, and the 15th day of November, 1916, in violation of Rule 19, of the ‘Rules Governing the Transportation of Freight’ adopted and promulgated by the Railroad Commissioners of Florida, and that in and by said decree your petitioner was appointed Special Master in Chancery of this court to take such accounting.

“Your petitioner further reports unto the court that said matter coming on before your petitioner for an accounting, the defendant, Florida East Coast Railway Company, declined to account for any overcharges collected by it prior to April 7th, 1914, and claimed that all

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overcharges collected prior to that date were and are barred by the statute of limitations. A copy of the notice of the defendant, declining to account for such overcharges collected prior to April 7th, 1914, is hereto attached, marked Exhibit 'A.'

"Your petitioner further shows that under and by the decree appointing petitioner Special Master in Chancery in said cause, your petitioner is directed to require the defendant to account for all overcharges collected by it between the 22nd day of October, 1912, and the 15th day of November, 1916.

WHEREFORE, your petitioner applies to the Court for further instructions in the premises.

Respectfully submitted,

CHAS. S. ADAMS,
Special Master in Chancery.

"EXHIBIT 'A'

"In the Circuit Court of Duval County, State of Florida.

"STATE OF FLORIDA VS. FLORIDA EAST COAST RAILWAY
COMPANY, A CORPORATION.

Accounting—Rule 19.

"To Honorable Charles S. Adams,

"Special Master in Chancery:

"Now comes the defendant, Florida East Coast Railway Company, by its solicitors, and in response to the demand made that it account for all overcharges collected by it prior to April 7th, 1914, under the decree of accounting made herein, alleges:

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“That this action was begun on April 7th, 1917, as shown by the record herein; and that all overcharges collected prior to April 7th, 1914, are barred by the statute of limitations controlling actions of this kind, to-wit, the three year statute.

“Wherefore defendant respectfully declines to account for any overcharges collected by it prior to April 7th, 1914, and prays that it may not be required so to do.”

The chancellor made the following order:

“This cause coming on for further hearing upon the report of Charles S. Adams, Special Master in Chancery, stating that the Florida East Coast Railway Company, defendant, has declined to account for any overcharges collected by it prior to April 7th, 1914, claiming that all overcharges collected prior to that date were and are barred by the statute of limitations controlling in actions of this kind, to-wit, the three year statute, and asking for instructions in the premises, and the court having heard arguments of counsel for the respective parties hereto, the Court finds and concludes that the three year statute of limitations applies, as claimed by defendant.

“In consideration whereof, it is ordered, adjudged and decreed that the Special Master in Chancery do not require the defendant to account for any overcharges collected by it prior to April 7th, 1914.”

From this order the plaintiffs appealed and assigned errors as follows:

“FIRST: The Court erred in overruling the petitions of the complainant requesting the Court to direct the defendant to account in said cause as decreed by the Court in its decree of December 14th, 1917.

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“SECOND: The Court erred in the rendition of said interlocutory decree in its finding and holding that all accounts prior to April 7th, 1914, were barred by the statute of limitations.

“THIRD: The Court erred in its said decree holding that the statute of limitations had run against any overcharges collected by the defendant between the 22nd day of October, 1912, and the 15th day of November, 1916, in violation and disregard to Rule 19 of the ‘Rules Governing the Transportation of Freight,’ adopted and promulgated by the Railroad Commissioners of the State of Florida.”

The statute under which this suit was brought is as follows:

“CHAPTER 5616—(No. 21).

“AN ACT to Amend Section 2921, Entitled ‘Mandamus, Injunction, etc.,’ Chapter 5, Entitled ‘Railroad Commissioners,’ of the General Statutes of the State of Florida, Relating to the Institution and Maintenance by the Railroad Commissioners of Proceedings Against Common Carriers.

“Be It Enacted by the Legislature of the State of Florida:

“Section 1. That Section 2921, entitled ‘Mandamus, Injunction, etc.,’ Chapter 5, entitled ‘Railroad Commissioners,’ of the General Statutes of the State of Florida, is hereby amended so as to read as follows:

“2921. Mandamus, Injunction, Etc.—Said Commissioners may, at their discretion, cause to be instituted in any court of competent jurisdiction in this State, by the

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Attorney General, State Attorney or special counsel, designated by them, in the name of the State, proceedings by or for mandamus, injunction, mandatory injunction, prohibition or procedendo, against any such company or common carrier subject to the provisions of this Chapter, or against any office or officer, agent or agents thereof, to compel the observance of the provisions of this Chapter, or any rule, rate or regulation of the Commissioners made thereunder, or to compel the accounting for and refunding of any moneys exacted in violation of any one of the provisions of this Chapter. In all cases where any common carrier shall have become indebted or liable for damages to a large number of persons by reason of its failure to abide by or comply with the provisions of any rule, rate or regulation of the Commissioners, or by its violation of any provisions of this Chapter, it shall be the duty of the Railroad Commissioners to demand of such common carrier by written notice served upon it, a discovery of the names of all such persons and an accounting and payment to all such persons of all such indebtedness or damages, and if such common carrier shall refuse or shall fail to make such accountings and payments within sixty days after such notice shall have been served upon it, it shall be the duty of the Railroad Commissioners to institute a proceeding or proceedings by or for mandamus or mandatory injunction against such common carrier to compel the making of such accounts and payments, and in any such proceeding upon an adjudication against such common carrier there shall be taxed as costs and paid over to the Railroad Commissioners to be paid out by them all such costs, attorneys' fees and expenses of such proceedings as shall appear to the court reasonable under all the circumstances and necessary to effect such accounting and settlement without cost or expense to the

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State or to the claimants, and the courts shall make all such orders as may be necessary or advisable to secure an accounting and payment of costs and damages as full and complete as may appear to be practicable, and any money not paid over to the persons to whom it shall be due within thirty days after such payment shall have been ordered made, shall be paid into the registry of the court to be disbursed to the proper persons upon orders of the court. And said Commissioners are hereby given and granted full authority to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions and objects of this Chapter.

“Sec. 2. This Act shall take effect immediately upon its passage and approval by the Governor.

“Approved June 3, 1907.”

Chapter 5624, Acts of 1907, amending Section 2910, Chapter 5, General Statutes of 1906, provides that “all suits under this Chapter shall be brought within twelve months after the commission of the alleged wrong or injury, except in cases where the Railroad Commissioners have heretofore been, or shall hereafter be, by the refusal of such railroad or common carrier to observe rates, rules, schedules or regulations, and in such cases, suits for such loss, damage or penalty may be brought within twelve months after the termination of such suits in favor of the Railroad Commissioners.”

The limitations in Chapter 5624 are expressly made applicable to “all suits under this Chapter,” which may mean Chapter 5 of the General Statutes of 1906, that is amended by Chapter 5624.

Chapter 6527, Acts of 1913, without express reference to the Chapter of the General Statutes, of 1906, amended

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stated sections of the General Statutes of 1906, including Section 2910 that had been amended by Chapter 5624, Acts of 1907, and repealed "all laws in conflict with the provisions of" Chapter 6527. Section 2910, General Statutes of 1906, as amended by Chapter 6527, provided that "all suits under this Act shall be brought within two years after the commission of the alleged wrong or injury, except in cases where the Railroad Commissioners have heretofore been or shall hereafter be, by refusal of such railroad or common carrier to observe the rates, rules, schedules or regulations by the Railroad Commissioners, compelled to resort to suits to enforce such rates, rules, schedules or regulations, and in such cases suits for such loss, damage, or penalty may be brought within twelve months after the termination of such suits in favor of the Railroad Commissioners."

This limitation does not expressly refer to suits brought under Section 2921, as amended by Chapter 5616, Acts of 1907. Chapter 6527 does not amend Section 2921, Chapter 5, General Statutes of 1906, that was amended by Chapter 5616, Acts of 1907.

It thus appears that Chapter 6527 does not include amended Section 2921, General Statutes of 1906, under which this suit was brought, and that Chapter 6527 amended Section 2910, General Statutes of 1906, as previously amended by Chapter 5624, so as to make it applicable only to "all suits under this Act," necessarily meaning Chapter 6527 and not Chapter 5, General Statutes of 1906, which latter Chapter was probably referred to by the limitations contained in Section 2910, as amended by Chapter 5624, Acts of 1907, where the limitation was extended to "all suits under this Chapter." Chapter 5624, Acts of 1907, expressly refers to Chapter 5,

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General Statutes of 1906, and makes the limitation applicable to "all suits under this *Chapter*." Chapter 6527 does not in terms refer to Chapter 5 of the General Statutes of 1906, and confines the limitation to "all suits under this *Act*," and repeals all conflicting laws.

The necessary result is that Section 2910, General Statutes of 1906, as amended by Chapter 5624, Acts of 1907, is superseded by Section 2910, as amended by Chapter 6527, Acts of 1913; and as the latter Chapter does not include Section 2921, General Statutes of 1906, as amended by Chapter 5616, under which this suit is brought, and as Section 2910, as amended by Chapter 6527, Acts of 1913, confines the limitation to suits under "*this Act*," meaning Chapter 6527, such limitation is not applicable to this suit, which is brought under Section 2921, General Statutes of 1906, as amended by Chapter 5616. The special statute of limitations not being applicable, the general statute was properly applied by the trial court.

The organic right of the carrier to immunity from heavy fines while it was duly testing the validity of the rates complained of as being confiscatory, did not preclude the Railroad Commissioners from bringing suits of this nature under the statute, for the benefit of shippers, to require an accounting for and payment of overcharges made in violation of the prescribed rates being tested as to their constitutional validity. The rates were *prima facie* valid, and violations of the rates could be redressed until the rates were duly adjudged invalid. Therefore, the running of the statute of limitations against the shippers, for whose benefit this suit was brought, was not suspended while the validity of the rates was being contested in the courts in mandamus proceeding (Florida East

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Coast R. R. Co. v. State, 79 Fla. 66, 83 South. Rep. 708), brought by the Railroad Commissioners against the carrier to enforce the prescribed rates in violation of which the overcharges, here sought to be redressed, were made by the carrier.

Affirmed.

BROWNE, C. J., AND TAYLOR, J., concur.

ELLIS AND WEST, J. J. Dissent.

On application for rehearing.

PER CURIAM.—In an application for rehearing, it is urged that as the statute provides that “in all cases where any common carrier shall have become indebted or liable for damages to a large number of persons by reason of its failure to abide by or comply with the provisions of any rule, rate or regulation of the Commissioners, or by its violation of any provisions of this Chapter, it shall be the duty of the Railroad Commissioners to demand of such common carrier by written notice, etc.,” and that as the carrier contested the validity of the rule that was violated in making the overcharges, the carrier did not become “indebted or liable for damages” so the Commissioners could bring suit under the statute until the validity of the rule was ultimately established in the litigation, and that consequently no statute of limitations ran against the excess charges collected until after the end of the litigation establishing the validity of the rule and that since the validity of the rule has been established no statute has run to bar the claims here involved.

But the carrier became “indebted and liable” for the

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overcharges when they were collected. The rule was *prima facie* valid, and when its validity was duly established, it was valid *ab initio*. The statute does not require the Commissioners to delay bringing suits for overcharges until the rule violated by making the overcharges has been judicially held valid.

While undue penalties for violating the rule could not be enforced pending a judicial inquiry into the validity of the rule, yet the remedy for overcharges collected was not superseded. And the validity of the rule could have been tested in such suits for overcharges.

Rehearing denied.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

UNITED STATES SAVINGS BANK, A CORPORATION, *Appellant*,
v. H. M. PITTMAN, *et ux et al.*, *Appellees*.

Opinion Filed March 11, 1920.

1. The relation of attorney and client is a relation of the highest confidential character, and if at any time in the course of litigation, the interests of the attorney in a suit become adverse or hostile to his client, he should cease to represent his client and give due notice of his withdrawal in order that his client may secure other counsel.
2. A client has a right to terminate the relationship between himself and his attorney at his election, with or without cause, the existence or non-existence of valid cause for the discharge of the attorney bearing only on his right to compensation. The right of a client to change his attorney at

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will is based on necessity in view of both the delicate and confidential relation between them and of the evil engendered by friction and distrust.

3. Ordinarily, in foreclosure proceedings in this State, attorneys where the mortgage provides for attorney's fees, accept the sum allowed by the court as their fee, but such fees are allowed the mortgagee and not the attorney. Such fee is intended as an indemnity to the mortgagee for expenditures necessarily made to protect his interests. Where an attorney performs services for which there is no agreement as to his fee, he will be entitled to recover *quantum meruit*.
4. Where an attorney is employed to foreclose a mortgage and there is settlement of the suit, carried on through and by the advice and with the consent of such attorney, by an acceptance of a deed to the mortgaged property, this is a satisfaction of the mortgage and the attorney can not proceed with the suit for the purpose of collecting his fees and have such fees allowed by the court without at least divulging to the court the facts and giving his client an opportunity to contest suit fees.
5. If an attorney after there has been developed an adverse interest to his client proceeds with the cause and obtains decrees adverse to the interest of the client and there is an appeal to the Supreme Court, and other costs, rendered necessary by such action of the attorney, a court of equity will tax such costs, including a reasonable attorney's fee, against such attorney.

An Appeal from the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Decree reversed.

Raymond M. Hudson, of Washington, D. C., and *Stephen E. Foster*, for Appellant.

John W. Bull, for Appellees.

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STATEMENT.

On October 25th, 1917, the appellant, hereinafter referred to as the complainant, by its solicitor, John W. Bull, an attorney at law, of Tampa, filed its bill in the Circuit Court of Hillsborough County, against H. M. Pittman and wife, for the foreclosure of a mortgage made and executed by Pittman and wife in favor of L. J. Cooper, and which had been assigned by Cooper to the complainant.

Complainant is a corporation, organized and existing under and by virtue of the laws of West Virginia and its sole place of business is Washington, D. C. It appears from the record that L. J. Cooper was indebted to complainant and had pledged the note and mortgage given to secure the notes as collateral for a loan made by complainant to L. J. Cooper. There were two notes, one for \$5,000.00 and one for \$2,000.00, each dated April 12, 1914, payable six months after date and providing for the payment of interest at 8% per annum and for attorneys' fees of 10% if collection was made through an attorney. The mortgage given to secure the notes provided for a reasonable attorneys' fee, in the event of a foreclosure.

The notes and mortgages above mentioned were, as above stated, pledged by L. J. Cooper to the complainant as collateral for a loan made by complainant to Cooper, amounting to \$3,400.00, and Pittman not paying the interest and being in default, the complainant wrote to John W. Bull, an attorney at law, of Tampa, on July 24, 1917, advising Mr. Bull that Pittman was in default and enquiring of Mr. Bull as to the value of the house or property described in the mortgage and requesting to be advised as to the value of the mortgaged property and how long it would take to "dispossess" Mr. Pittman.

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It appears from the correspondence between the complainant and Mr. Bull that complainant was of the opinion that Mr. Pittman could be dispossessed in some manner and the complainant be given possession of the property. Mr. Bull advised the complainant by letter dated August 2nd, 1917, to the effect that Pittman could not be compelled to vacate the house, or mortgaged premises, except by foreclosure proceedings, and also, according to complainant's statement to Bull, that complainant was not the owner of the notes and mortgage, but held the notes only, and that L. J. Cooper was the real owner of the mortgage. To this the complainant replied that Mr. Bull's conclusions were correct and that the notes were held as collateral to a note given by L. J. Cooper, and stated that the amount due to it was only \$3,400.00.

At the suggestion of Mr. Bull, a proper assignment of the mortgage was secured from L. J. Cooper and Mr. Bull advised complainant by letter dated August 16, 1917, that he would begin foreclosure proceedings promptly on receipt of the proper assignment and transfer of the notes and mortgage. On September 7, 1917, the complainant transmitted the notes, mortgage and assignment to Bull, and in its letter of that date stated "we would like for you to take immediate steps to get possession of this house and advise us of the progress made."

On September 10, Mr. Bull replied to the above letter and stated: "You seem to misunderstand as to my being able to get possession of the house for you, which is now occupied by Mr. Pittman. I attempted to explain in a former letter that the only way in which we can do this is by foreclosing the mortgage," and he also requested that the original notes and mortgage be sent him and suggests that Pittman "might be willing to give a deed con-

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veying the property to complainant rather than to risk the chance of a deficiency decree, but if he does not do this and surrender possession of the house, the only thing to do is to file suit to foreclose the mortgage."

The complainant sent the notes and mortgage to Bull at the same time sent a remittance of \$10.00 to cover advance costs in the foreclosure proceedings.

On September 20, 1917, after receipt of the notes and mortgage and assignment, Mr. Bull wrote the complainants, stating "I think the amount of the mortgage is all the property is worth, but a deficiency decree against Pittman would not be worth anything. There is no need of going to the expense of foreclosure in this unless we are sure of obtaining a decree." In the same letter Bull states that "Mr. Pittman is in a bad way financially and intimated unless he can make some satisfactory arrangement with Cooper he may give you a deed to the property rather than let you foreclose, if this be satisfactory to you."

In reply to this complainant on September 24, 1917, replied: "If Mr. Pittman will give us a deed, why certainly that would be better than going through the form of a foreclosure, if he is insolvent."

On October 9th, 1917, the complainant, not hearing from Mr. Bull, again called attention to the fact that it would prefer securing a deed from Pittman rather than go through the form of a foreclosure. On October 13th, Bull replied to this statement that he had advised Pittman that foreclosure proceedings would be instituted, and again on October 30, the complainant wrote Bull that they desired him to double his energy and get Pittman out of the house at the earliest possible moment.

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On October 27th, 1917, a few days after the bill was filed, it appears that Pittman sent a telegram to complainant, reading as follows: "Do you want to stop suit or stand investigation," and to this complainants a few days later answered also by wire, "Execute deed immediately, or we will secure judgment for difference."

On November 2nd, Bull, by letter, acknowledges receipt of a letter from the complainant, in which he advises complainant that he will immediately prepare a petition for the appointment of a receiver to take charge of the house and lease it if possible during foreclosure proceedings upon the ground that the premises will not sell for only about half of the amount necessary to take care of the mortgage indebtedness."

The application for a receiver was made and by order of the court the petition was made a part of the bill of complaint as an amendment to the bill. This petition was sworn to by Mr. Bull, and recites that "said premises will not sell at forced sale for a sum sufficient to pay the amount of the indebtedness secured by the mortgage, together with interest, attorneys' fees and costs." The application for a receiver was denied by the Circuit Judge, and on November 17, 1917, Bull advised complainant of his failure to secure the appointment of a receiver and stated that Mr. Pittman's attorney "is going to advise Mr. Pittman to give you a deed to the property rather than for a deficiency decree to be entered."

In his letter of November 28, 1917, advising complainant of the failure to secure the appointment of a receiver, Bull says: "You state in one of your letters that all that was actually due you on the notes of L. J. Cooper, which was secured by this mortgage as collateral is about \$3,400.00. I am hoping to be able to sell this property for

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you for enough to cover the amount actually due you and all costs, insurance, attorneys' fees, and will appreciate it if you will let me know as soon as possible the exact amount which you must realize on this property so as to save yourself any loss. I take it for granted that you do not want the property on your hands, even if you have to lose a little, but I wish to assure you, judging from the way property is selling down here at present, at forced sale, this place will not bring much more than its *actual* value.'

To this complainant replied on November 30th and say that the balance due on the notes is \$3,400.00, but we want all we can get out of the house and do not want it sold at a sacrifice at all. "Hope you can get Pittman out of the house in the next few days or get a deficiency judgment against him. Please advise us of the date of the sale of this house."

On December 3rd, 1917, the defendants, Pittman and wife, filed a demurrer to the bill.

On December 10, 1917, Bull wired the complainant the following message: "Pittman will give deed immediately provided you lease him house by month at forty dollars, payable advance, wire." The same day complainant wired Bull as follows: "You will likely have to make Pittman vacate in thirty days for non-payment and therefore make lease monthly, only cash in advance, and charge prevailing price. Use your best judgment about the price."

On January 18th, 1918, the complainant wrote Mr. Bull requesting to be advised of the situation, and stating that it did not want to delay with Pittman. However, on January 17th, 1918, Bull wrote complainant a letter in which he states: "I have at last secured the key to the Pittman

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house and he and his wife moved out completely, I have also today received from his attorney, Craig Phillips, a quit claim deed to the property conveying the same to your bank. The place is in our possession for whatever disposition we wish, and I await your further instructions in the matter. Of course, my services as your attorney have really been performed, and I have conducted the foreclosure proceedings from the beginning, and I have obtained from Mr. Pittman the settlement which you agreed to accept. This, of course, means that foreclosure proceedings against him are to be dismissed, and you are to execute a satisfaction of mortgage. In as much as Mr. Pittman had accepted your proposition before I had to go to the trouble of taking testimony and selling property, I shall charge you a fee of only \$650.00, and upon receipt of your check for same, I will file your quit claim deed for record." He also says in his letter, if the actual indebtedness of L. J. Cooper to you which is secured by the mortgage is only \$3,400.00 you are getting a place worth, in normal times, about \$5,500.00.

On January 27th the complainant replied to this letter and noting that Bull wanted a fee of \$650.00, stated "which we think is outrageous and wholly unreasonable, and we therefore decline to pay the same." So far as the value of the house is concerned that should have nothing to do with your claim, as our claim was only \$3,400.00, but if we are not mistaken you said some time ago that the house would only bring about what your claim was, but your figures have suddenly jumped up to \$7,412.00.

On February 1st, 1918, there was entered in the case an order overruling the demurrer filed in December and entering a decree *pro confesso*, the solicitor for the defendants, Pittman and wife, consenting that a decree *pro con-*

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fesso be entered against them provided no deficiency decree be entered against them, and also admitting that they did not desire to plead further in the case.

This decree *pro confesso* was followed by an order made the same day, appointing a Special Master to take and report the testimony. On the same day, that is on February 1st, 1918, the complainant's solicitor, Bull, although having in his possession a quit claim deed from the defendants, Pittman and wife, and having the key to the house, and as he states in his letter of the 17th of January, 1918, "the place is in our possession," produced before the original notes and mortgage and the assignment thereof and made proof of the full amount of the notes and interest thereon a total of \$7,561.05, and caused two attorneys of Tampa, Florida, to be sworn and testify as to a reasonable attorney's fee in the proceeding.

The complainant's attorney, Bull, was not sworn in this proceeding, but made what the Special Master states in his report, a statement. In this so-called statement appears the following: "There is due on said notes, together with principal and interest at the present time, the sum of \$7,561.05, and no part of said sum has been paid since the notes were placed with me for collection." In this Mr. Bull was mistaken, as the debt had been extinguished by the quit claim deed and surrender of the premises to the possession of complainants, according to the letter of Mr. Bull of January 17, 1918.

The attorneys called by complainant's solicitor to testify as to attorney's fees were told by Bull in his statement of the case and by questions propounded, of all that he had done in the case as to filing the bill, the petition for a receiver, the overruling of the demurrer, the atten-

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tion to the payment of insurance and taxes paid by the complainant and of the consent decree *pro confesso*.

The attorneys so testifying under the facts revealed to them testified that a reasonable fee of ten per cent would be a proper fee; that is to say, they testified that \$750.00 would be a reasonable fee in the case as stated to them.

The Master's report was filed February 2nd, 1918, and on the same day the Master's report was submitted to the Circuit Judge, who immediately rendered a final decree of foreclosure, finding the equities with the complainant and awarding the complainant the sum of \$7,561.05, as due for principal and interest and allowing \$750.00, as a reasonable attorney's fee for complainant's solicitor and ordering Pittman to pay the same with costs within one day from the date of the decree and providing for the usual sale of the property in case of default and after due publication of the notice of sale. It also appears from the record that Bull caused the sale advertisement to be inserted in a Tampa paper on February 2nd, 1918, and by said sale notice the property was to be sold on March 4th, 1918.

On February 2nd Bull wrote complainants and notified them of the final decree he had procured that day and sent a copy of the decree with his letter and reaffirming his claim for his fee and stating that he had a lien upon the property so advertised for sale. In this letter he also stated: "Under your directions I accepted this deed upon the agreement with Mr. Pittman to deliver him a satisfaction of mortgage. This deed has never been recorded because you have never sent me the satisfaction which I mailed you. I did not write you as soon as Pittman moved out of the house because I was waiting to get the deed from him, which he had some trouble in getting his wife to sign."

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On February 6th, 1918, the complainant enclosed to Bull the instrument which he had sent them on January 17th, showing a satisfaction of the Pittman mortgage. In referring to this satisfaction of mortgage, we will say that on March 12th, 1918, there was filed and made a part of the record of the case an affidavit of Pittman in which he states that on or about the 16th day of January, 1918, he caused to be delivered to John W. Bull, solicitor for the complainant, a quit claim deed to the property described in the mortgage and to be delivered to complainant by the said John W. Bull, or recorded solely upon the condition that the complainant should dismiss the foreclosure proceedings and satisfy said mortgage of record.

On March 1st, 1918, the complainant moved the court to enter an order striking out John W. Bull, Esquire, as solicitor and attorney for the said complainant in this cause and alleges that the act of Mr. Bull in having the cause referred to a Special Master and taking the testimony and in having the report of the Master confirmed and procuring a final decree was unwarranted, unauthorized, illegal and unlawful and against the wishes and desires of the complainant, as the said John W. Bull well knew, and put this defendant in the position of being liable to the said Pittman and wife for violation of the agreement with them should the court hold that such action of the said John W. Bull binds this complainant so far as the said H. M. Pittman is concerned.

"That the said John W. Bull violated his duty as solicitor and attorney for a client by such action. That said John W. Bull when he proved the said mortgage and notes before the Special Master on February 2nd, 1918, knew that the statement he then made before the Commis-

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sioner (Special Master) on which the Commissioner based his findings was and is false, because he then had in his possession a deed from H. M. Pittman to complainant to certain property in full satisfaction of said mortgage and he had himself given the said H. M. Pittman a letter to that effect and which was binding on the complainant and the said John W. Bull has in his possession the satisfaction of the mortgage which should have been delivered to the said H. M. Pittman.

That the said John W. Bull when called upon today by the duly authorized attorney for the complainant to deliver up the deed, said deed from the said Pittman to the complainant, refused to do so, though he at first stated on such demand that he would deliver up the satisfaction of mortgage, but immediately changed his mind and refused to give up either the said deed or the said satisfaction of mortgage, stating that he had a lien on them for his attorney's fees.

At the same time the complainant, who was represented in these motions by an attorney of Washington, D. C., who was in Tampa endeavoring to get matters settled, filed a motion to vacate and set aside the final decree of sale entered February 2nd, 1918. This last motion was with certain affidavits made a part of the motion to strike Mr. Bull from the case as solicitor and attorney for the complainant.

The grounds of the motion to vacate the final decree are as follows: First, because the order was obtained and entered without the consent of the complainant, the said Bull having no authority to act for the complainant at the time and in the manner he did. Secondly, because the matters in controversy had been already settled and compromised, the defendant Pittman having already

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delivered to the complainant or its attorney Bull a deed to the property in question in settlement of the notes involved. Thirdly, because the order of the sale is manifestly unfair to the defendant who had prior to the final order delivered a deed to said property. Fourthly, because it is unfair to complainant to order a sale of this property and the payment of the necessary fees incidental thereto when complainant already has a deed to the property. Fifthly, because the final order of sale was and is manifestly for the purpose of aiding said John W. Bull by questionable methods in exacting and collecting from complainant an excessive and exorbitant fee as complainant already had a deed to the property that was ordered sold as above stated. Sixthly, that complainant had no notice of application for decree of sale or fixing of fee.

WILLS, Circuit Judge (*after stating the facts.*)

It appears from the record in this case that at the time the order was made by the Circuit Judge, overruling the demurrer and allowing a decree *pro confesso* and reference to a master that the object sought by the complainant had been accomplished. A conveyance of the mortgaged premises had been made to it, the deed delivered to complainant's counsel and possession of the mortgaged premises delivered to complainant. The action of Attorney Bull in bringing up the demurrer for settlement was not done in the interests of the complainant, but done by him solely for his interest and for no benefit of his client. He had been advised that his demand for a fee was refused, and it is clear that all steps taken by him on and after February 1st, 1918, were taken by him for his interest and not that of his client.

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The relation of attorney and client is a relation of the highest confidential character, and if at any time in the course of litigation, the interests of the attorney in a suit become adverse or hostile to his client, he should cease to represent his client and give due notice of his withdrawal in order that his client may secure other counsel.

It is apparent that the entry of the final decree was solely for the purpose of attempting to collect a fee for the benefit of Solicitor Bull. The record shows that there was a dispute between the complainant and its then solicitor as to the amount and reasonableness of the fee to be paid Bull for the services he had rendered.

An attorney is entitled to compensation for services rendered, and in proper proceedings may enforce the collection of such compensation. An attorney employed at a fixed fee to perform certain services cannot be deprived of his compensation by his client preventing the performance of such services by settlement. Where an attorney performs services for which there is no agreement as to his fee, he will be entitled to recover *quantum meruit*. 2 R. C. L. 1046.

Ordinarily, in foreclosure proceedings in this State, attorneys where the mortgage provides for attorneys' fees, accept the sum allowed by the court as their fee, but such fees are allowed the mortgagee and not the attorney. Such fee is intended as an indemnity to the mortgagee for expenditures necessarily made to protect his interest. Jones Mortgages, Sec. 359.

The facts in the instant case show clearly to our mind that at the time the final decree of foreclosure was rendered, the mortgage had been settled by the acceptance of a deed conveying the mortgaged premises to the com-

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plainant and possession taken thereof by the attorney for his client, and his co-defendant, the mortgagor was or had been attempting to rent the premises. It is true that it is contended that the deed was only taken and held in the nature of an escrow, and this is attempted to be substantiated by the affidavit of Pittman, until the cancellation of the mortgage had been delivered and which was subsequently delivered to Bull by the complainant.

If the facts establish this contention, which we do not think they do, then certainly the decree should be set aside for the reason that there was an agreement to accept the deed and that there should be no deficiency decree against the defendant, Pittman, and the foreclosure decree sets out that there shall be no deficiency decree entered thereon and certainly no court of equity will permit a party to receive benefits for which he has given nothing.

The facts disclosed in this record show that at the time the order was entered on the demurrer, there had been a settlement of the case by the giving of the deed to the property in litigation by which the mortgaged premises were conveyed by Pittman and wife to the complainant, and the only condition to be fulfilled was the delivery of the satisfaction of the mortgage. Mr. Bull's contention to the contrary was incorrect. He had been the attorney and agent of complainant and had transacted all the business relative to the litigation. The attorney for the defendant, Pittman, was also aware of these facts, and, in our opinion, the attorney should have made known to the Circuit Judge the facts relative to this deed, and had this been done, the court would not have entered the decree. It was the duty of Bull, when he was advised by his client that it would not pay the fee he demanded, to

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have notified his client of his further intentions in the case, so that his client could be heard. In other words, the action of Bull in procuring a ruling on the demurrer and the agreement to have a foreclosure decree without a deficiency decree and fixing the amount of his fee, was, so far as his client was concerned, against the wishes of his client and adverse to the interests of his client. He should have notified his client of his adverse views before proceeding further and given his client an opportunity to secure counsel and be represented in the further progress of the case, especially as to the question of fees to be allowed himself. He should not have placed himself in the position of representing his client, while, in reality, he was representing only his own demand and not that of his client.

While we do not agree with the views of the complainant as to the amount of the fee to be allowed Bull, and we believe that on this feature of the case the complainant has an entirely wrong view of the case, we think that the conduct of Bull in procuring the reference to the Special Master and the entry of the foreclosure decree, was under the circumstances an improper proceeding, and that when this was called to the attention of the Circuit Court, the same should have been vacated and set aside.

We are of the opinion that as the complainant had applied to the court for leave to substitute another attorney and to strike Bull from the case as its attorney, this should have been granted. To this motion the attorney, Mr. Bull, filed a demurrer. Upon examination of the motion and Bull's demurrer thereto, we hold that this should have been granted, upon terms. At the time the motion was made to strike Bull from the record as attorney for the complainant it was apparent that there were differ-

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ences between the client and attorney to the extent that it was no longer proper that the relationship should continue with justice to either party and the orderly procedure necessary in courts of justice.

The authorities universally recognize the right of a client to terminate the relationship between himself and his attorney at his election, with or without cause, the existence or non-existence of valid cause for the discharge of the attorney, bearing only on his right to compensation. The right of a client to change his attorney at will is based on necessity in view of both of the delicate and confidential relation between them and of the evil engendered by friction and distrust. 2 R. C. L. 927.

In our opinion, the Circuit Court should have granted this motion, and by proper order reserved the right to make an inquiry as to the proper amount to be allowed Bull on a *quantum meruit* for the services he had rendered in the case for the complainant up to the time of receiving the deed to the mortgaged premises and the possession thereof. There was no necessity or reason for the entry of the decree of foreclosure, and it appears to us that the evidence upon which the fee was fixed does not disclose the true facts of the case or of the professional services and skill rendered by Bull in the case.

For the reasons stated, the case should be reversed with directions to the Circuit Court to set aside and vacate the decree *pro confesso* and final decree of foreclosure and for further appropriate proceedings.

PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and ad-

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judged by the court that the decree appealed from be, and is hereby, reversed, and the cause is remanded with directions to set aside and vacate the decree *pro confesso* and final decree of foreclosure and by proper proceedings to ascertain the amount of a reasonable fee to be allowed John W. Bull for the services legitimately, actually and necessarily rendered up to the time of receiving the deed to the mortgaged premises, and also at the same time to ascertain a reasonable fee to the appellant complainant's present attorneys for their services in procuring the vacation of the decree *pro confesso* and final decree of foreclosure wrongfully obtained by John W. Bull, including the representation of the case in this court, as well as all court costs of this proceeding for the vacation of said decree *pro confesso* and final decree of foreclosure, including the costs of this appeal and that the amount of such last mentioned attorneys' fees and said court costs in this proceeding be adjudged against said John W. Bull, and shall be deducted from the amount of the fee found to be due to said Bull for his legitimate services in the original foreclosure case, and upon the payment to said Bull of the balance, if any, that the deed to the premises in question made by the mortgagor to the complainant be delivered by Bull to the complainant, and that he also deliver to the mortgagor the satisfaction of said mortgage, and that the bill of complaint for foreclosure of such mortgage be dismissed. If there is no balance left due to said Bull after making the deductions hereinbefore directed, then he shall at once deliver said deed and satisfaction of mortgage as above directed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

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SOUTHERN COTTON OIL COMPANY, *Plaintiff in Error*, v. L.
J. ANDERSON, *Defendant in Error*.

Opinion Filed June 30, 1920.

Petition for Rehearing Denied December 16, 1920.

1. A motor vehicle operated on the public highways is a dangerous instrumentality, and the owner who entrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is entrusted.
2. "The servant is empowered by the master to discharge certain duties, and it is incumbent upon him to exercise the same care and attention which the law requires of the master; and if that care and attention be about the management and custody of dangerous appliances, the master cannot shift the responsibility connected with the custody of such instruments to the servant to whom they have been intrusted, and escape liability therefor. This rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, engines, or instruments—liable, if negligently managed, to result in great damage to others."
3. An automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used and his liability extends to its use by any one with his knowledge or consent.
4. The Legislature under its police power to protect the public from dangerous instrumentalities using the highways has imposed rigid restraints, regulations and restrictions upon the use of motor vehicles, thus recognizing the danger from their operation, which makes owners liable in damages under the doctrine of *respondeat superior* as applied to dangerous agencies..

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5. Chapter 7275, Acts of 1917, treats the automobile when operated on the public highways as a dangerous instrumentality so as to require special regulation and control under the police power, and it is not divested of its dangerous character in an action for damages caused by the negligence of the operator who is using the car with the owner's knowledge or consent.
6. In entrusting a servant with a highly dangerous agency the master puts it in his servant's power to mismanage it, and as long as it is in his custody or control under such authority the master is liable for any injury committed through the servant's negligence.

A writ of error to the Court of Record for Escambia County; E. C. Love, Judge.

Judgment affirmed.

Watson & Pasco and Blount & Blount & Carter, for Plaintiff in Error;

F. W. March and Scott M. Lofton, for Defendant in Error.

BROWNE, C. J.—This is an action by Louis J. Anderson against the Southern Cotton Oil Company for personal injuries caused by the negligent operation of an automobile belonging to the Southern Cotton Oil Company.

The case is before the court for the second time.

On the first hearing Anderson, the plaintiff below, brought writ of error to test the ruling of the trial judge in directing a verdict for the defendant. This we held was error, and the judgment was reversed on that ground. *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 South. Rep. 975.

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On a retrial of the cause the plaintiff obtained a verdict and judgment for \$7,500.00 with interest, and the defendant is here on writ of error complaining that the evidence was insufficient to sustain the verdict, and of rulings of the court on the evidence and of certain instructions given on request of the defendant.

The defendant in error contends that as this court reversed the former judgment on the ground that there was substantial evidence tending to prove the issue, we are bound by that as the law of the case, and should not disturb the ruling of the trial judge on the sufficiency of the evidence to support the verdict rendered on the second trial where the testimony is substantially the same as on the first.

The rule contended for in that proposition is supported by strong authority. In *Pleasants v. Fant*, 22 Wall. (U. S.) 116, it is thus stated:

“In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence *sufficient* to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, it is *sufficient* to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had?

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Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In *Wilson v. Jernigan*, 57 Fla. 277, 49 South. Rep. 44, the distinction is drawn between the duty of the court on a motion to direct a verdict, where there is evidence tending to prove the issue, and the denial of a motion to set aside the verdict on the ground of the insufficiency of the testimony to support it. The court said: "The first assignment is based upon the overruling of the motion for a new trial, while the seventh is based upon the refusal of the trial court to instruct or direct the jury to return a verdict in favor of the plaintiffs," and held that the request for a directed verdict in favor of the plaintiff "was properly refused," citing *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. Rep. 740; *Starks v. Sawyer*, 55 Fla. 596, 47 South. Rep. 513; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. Rep. 910.

The case being submitted to the jury a verdict was rendered for defendant, and this court reversed the judgment because the trial judge refused to set it aside on the grounds that the evidence was insufficient to warrant the jury in finding a verdict for the defendant.

Thus the court approved the ruling of the trial court refusing to direct a verdict for the defendant, and reversed the judgment because he denied the motion to set aside the verdict on the ground that "the evidence adduced was not sufficient to warrant the jury in returning a verdict for the defendant."

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This court has endeavored in several cases to point out the distinction between what is essential on motion to direct a verdict, and on motion to set aside a verdict because the evidence is insufficient to support it. The distinction is probably as clear as language is capable of showing so shadowy a difference, but it is the frequent cause of contention before this court, and the trial judges are often lost in its mazes.

What this court has said on this subject can be found in *Carney v. Stringfellow*, 73 Fla. 700, 74 South. Rep. 866; *Gravette v. Turner*, 77 Fla. 311, 81 South. Rep. 476.

It is not necessary to consider the assignments of error separately, as this case must be decided on a doctrine that disposes of all of them adversely to the plaintiff in error.

It is conceded by the plaintiff in error that the negligence of the driver of the automobile that caused the injury to the defendant is established, and the only issue is the responsibility of the Southern Cotton Oil Company for this negligence. This responsibility must be measured by the obligation resting on the master or owner of an instrumentality that is peculiarly dangerous in its operation when he entrusts it to another to operate on the public highways.

The rule is not a new one, and far from being the enunciation of "a judicial statute" as intimated by counsel for plaintiff in error, it is but the application of an old and well settled principle, to new conditions. The rule is thus stated in *Pollock on Torts*, 506; "The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such a risk is held, although his act is not of itself wrongful, to in-

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sure his neighbor against any consequent harm not due to some cause beyond human foresight." * * * "Some times the term 'consummate care' is used to describe the amount of caution required; but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him." * * * "This amounts to saying that in dealing with a dangerous instrument of this kind the only caution that will be held adequate in point of law is to abolish its dangerous character altogether."

It is true that in the early development of this very salutary doctrine, the dangerous agencies consisted largely of fire, flood-water and poisons. In *Dixon v. Bell*, 5 Maule & S. 198, Lord Ellenborough extended the doctrine to include loaded fire-arms. With the discovery of high explosives they were put in the same class. As conditions changed it was extended to include other objects that common knowledge and common experience proved to be as potent sources of danger as those embraced in the earlier classifications. The underlying principle was not changed, but other agencies were included in the classification. Among them are locomotives, push-cars, street cars, etc., and it is now well settled that these come within the class of dangerous agencies, and the liability of the master is determined by the rule applicable to them. The reasons for putting these agencies in the class of dangerous instrumentalities, apply with equal if not greater force to automobiles.

This is recognized in the case of *Weil v. Krentzer*, 134 Ky. 563, text 567, 121 S. W. Rep. 471:

"An automobile is nearly as deadly as, and much more

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dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train."

The discussion of this question in *Nashville & Chattanooga R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296, is enlightening in this connection. The court said: "It was the established doctrine of the common law that the master is not liable for the torts of the servants not committed in the line of the master's service, or with his assent or ratification. This doctrine has been greatly modified as applied to railroad companies, on account of the absolute necessity for more stringent rules for the protection of life and property, against the perils of the steam engine and its capacity for mischief."

In *Black v. Rock Island A & L. R. Co.* 125 Ia. 101, 51 South. Rep. 82, 26 L. R. A. (N. S.) 166, the court said:

"The right to operate a steam locomotive on or across a street in a town involves the use of an agency highly dangerous to life, limb and property, and the responsibility for the exercise of such right cannot be shifted by the corporation in which it is vested to the person who, by its authority, actually exercises it."

Says the Supreme Court of the United States: "The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the *causa causans* of the mischief, while the proximate cause, or the *ipsa negligentia* which produces

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it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety." *Philadelphia & Reading R. Co. v. Derby*, 14 How. (U. S.) 468. On the subject of a locomotive being a dangerous agency, see also *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *Nashville & Chattanooga R. Co. v. Starnes*, *supra*; *Bittle v. Camden & A. R. Co.*, 55 N. J. L. 615, 28 Atl. Rep. 305, 23 L. R. A. 283; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Texas & P. R. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479, 23 U. S. App. 506, 27 L. R. A. 179; *Barmore v. Vicksburg, S. & P. R. Co.*, 85 Miss. 426, 38 South. Rep. 210, 70 L. R. A. 627.

A push car operated on a railroad track has been held to be a dangerous agency. *Salisbury v. Erie R. Co.*, 66 N. J. L. 233, 50 Atl. Rep. 117, 55 L. R. A. 578; and in *Danbeck v. New Jersey Traction Co.*, 57 N. J. L. 463, 31 Atl. Rep. 1038, a street car was held to be a "machine of highly dangerous character."

In a former decision of this cause by this court we said: "The owners of automobiles in this State are bound to observe statutory regulations of their use and assume liability commensurate with dangers to which the owners or their agents subject others in using the automobiles on the public highway. The principles of the common law do not permit the owner of an instrumentality that is not dangerous *per se*, but is peculiarly dangerous

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in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle, that is not inherently dangerous *per se*, but peculiarly dangerous in its use, properly operated when it is *by his authority* on the public highway. In view of the dangers incident to the operation of automobiles and of the duties and obligations of the owners of motor vehicles under the statutes of the State, it could not be said that on the facts of this case no question was made for the jury to decide." *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 South. Rep. 975.

The distinction there drawn was that an automobile, like a locomotive or a trolley car, has no inherent elements of danger, but that it is peculiarly dangerous in its operation and use on the public highways.

Much confusion has resulted from the use by the courts and text writers, of a term so inadequate and unfit as "*dangerous per se*" in discussing the liability of the owner of an instrumentality that is peculiarly dangerous in its operation, who permits another to run it on the public streets and highways.

Wild animals and high explosives are dangerous *per se*; that is, they may inflict injury without the immediate application of human aid or instrumentality. Neither a locomotive, a trolley car nor an automobile is dangerous *per se*—by or through itself—in that neither can inflict injury to a person except by its use or operation. A locomotive in the roundhouse, a trolley car in the barn, an automobile in a garage are almost as harmless as canary birds; but in operation they are dangerous instrumentalities, and the master who intrusts them to another to oper-

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ate—the one on its right-of-way, the others on the public highways—cannot exonerate himself from liability for injury caused to others by the negligence of those to whom they are entrusted. As said in *Barmore v. Vicksburg S. & P. R. Co.*, *supra*:

“The servant is empowered by the master to discharge certain duties, and it is incumbent upon him to exercise the same care and attention which the law requires of the master; and if that care and attention be about the management and custody of dangerous appliances, the master cannot shift the responsibility connected with the custody of such instruments to the servant to whom they have been entrusted, and escape liability therefor. This rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, engines, or instruments liable, if negligently managed, to result in great damage to others.”

We are not unmindful that a goodly number of courts lay down a different rule, but their conclusions are not persuasive, because they ignore the dangerous character of the automobile as operated on the public highways, and treat it as a machine at rest.

Huddy on Automobiles, Sec. 36, says: “It is believed to be a *common opinion among many that the automobile constitutes a dangerous machine*, and that the operation of the motor vehicle on the public thoroughfare is necessarily hazardous.” This, he says, “is a mistaken view.” It is rather dogmatic to set up one’s individual opinion against the “common opinion among many” on a subject on which the “many” are capable of forming an intelligent opinion. It is also difficult to understand why some courts, in deciding whether or not an automobile is a dangerous machine—which, after all, must be determined

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by common knowledge based upon general experience—should announce an opinion at variance with “the common opinion among many.”

A judicial opinion on established facts and well-known conditions, counter to the common opinion of the many on the same subject is persuasive only to those who desire to accept the unreasonable and reject the obvious.

The quoted passage from Huddy is found in all the editions of his work, but the first edition contains the data upon which he bases his opinion, that the automobile is “not a dangerous agency,” that is omitted in all later editions. He says, “As bearing on this question, it has been stated by authority that out of a total of 3,482 deaths reported to the coroner’s offices in the city of Chicago for the year 1905, only five were caused by automobiles. For every death caused by automobiles in the city of Chicago there were more than seventy deaths caused by railroad accidents.”

That was in 1905. In its weekly news-letter of March 22nd the National Safety Council, an organization that is doing a vast work to prevent accidental injuries in the United States, gives what purports to be figures from reports from the coroner showing fatal accidents in Cook County as follows: In 1918, automobiles 374, railroads 318, and street cars 146; in 1919, automobiles 420, railroads 208, street cars 132. Thus in 1918 there were 56 more deaths from automobiles than from railroads, and in 1919 there were 212 more deaths from automobile accidents than from railroads, and 33 more than from railroads and street cars combined. From 1905 to 1920 the number of deaths from railroad accidents diminished from about 350 to 209, while in the same period deaths from automobiles increased from 5 to 420.

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The U. S. Census Bureau in its bulletin published Feb. 2, 1920, places the number of deaths in the United States in 1918 from "Automobile accidents and injuries," at 7,525—a close second to deaths from "railroad accidents and injuries," which during the same period were 8,610; and more than three times as many as those caused by "street car accidents," which were only 2,366.

The Census Bureau makes this comment on automobile accidents: "Deaths from automobile accidents and injuries in 1918 totaled 7,525, or 9.2 per 100,000 population. This rate has risen rapidly from year to year, which strongly suggests the need for better traffic regulations and better enforcement of those we now have."

The National Safety Council has this to say: "The following three facts emphasize the seriousness of automobile hazards:

"1. In 1919 there were approximately one-half as many people killed by this one machine alone as were killed accidentally in all industries, mines and railroads.

"2. While the industrial hazards are coming under control and methods of prevention are pretty well standardized, accidental deaths on the streets are mounting by leaps and bounds, and very little has been done to date in the way of an organized effort to control this hazard.

"3. Whereas, only a portion (possibly $\frac{1}{4}$) of the total population in the United States is exposed to the hazards of industry, practically every man, woman and child the moment they leave their doors are exposed to the automobile hazards."

"We say the automobile has become the most deadly machine in America because the mortality report of the

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Census Bureau and statistics being received daily by the National Safety Council indicate that during recent years automobile accidents have resulted in approximately one-half the number of deaths caused by industrial accidents of all sorts. In Chicago 420 persons were killed in automobile accidents during 1919; in Cleveland, 136; in St. Louis, 97; in the Borough of Manhattan, New York, 191 children under fifteen years of age were killed by automobiles, and in Greater New York, 677 persons were killed by automobiles in one year. In Rochester, N. Y., as many deaths were caused by automobile accidents as by street cars, railroads and industrial accidents combined. Even more alarming than these statistics is the fact that in almost every case a comparison, year by year, of the number of automobile deaths and the number of automobiles in use indicates that the deaths are increasing in almost exact mathematical ratio with the increase in number of automobiles."

However cleverly the courts may state the reasons why they think the automobile in operation on the streets and highways is not a dangerous instrumentality or agency, these statistics afford a complete refutation.

In view of the greatly increased number of deaths from automobile accidents since Mr. Huddy in his first edition gave the statistics upon which he based his conclusion that the automobile in operation on the public highways is not a dangerous machine, his dictum loses whatever weight it might have had, and suggests the inquiry why he adheres to it?

Perhaps a reply to this, and to the distinction sought to be drawn between locomotives and automobiles as dangerous agencies, may be found in Mr. Babbitt's work on

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Motor Vehicles, Sec. 322, where he naively says: "An examination of the cases of the last five years discloses that the increasing popularity of motor vehicles has had its effect on the courts with the result that all the decisions of that period are unanimous that a motor vehicle is not in the class of dangerous agencies." We question, however, his premises and his conclusion. What most of the courts hold, is that it is not dangerous "*per se*," thus merely asserting the obvious, and begging the question by seeking to negative what no one asserts; for we are not dealing with the machine at rest, but in operation on the streets and highways.

Upon this proposition we quote from *Barmore v. Vicksburg, S. & P. R. Co. supra*.

"An attempt has been made, in a very few illogically reasoned cases, to draw a distinction between instrumentalities 'dangerous in themselves,' and those 'dangerous by reason of improper use,' and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility. The argument has a degree of plausibility when limited to agencies inherently dangerous even when most carefully handled, such as dynamite and similar substances, as distinguished from those of like character, such as gasoline, naphtha and the like, only dangerous when proper precautions are not observed; but the sophistry of the argument becomes apparent, and refutes itself when we come to the consideration of dangerous engines, machinery or appliances. No appliance is 'dangerous of itself,' but practically every appliance may become 'dangerous by improper use.' Neither a locomotive, pile-

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driver, electric or cable car, automobile, threshing machine, or team and wagon, is 'dangerous of itself,' yet with practical unanimity the courts hold the master liable for damages caused thereby, even though the servant who has the sole custody and control thereof is at the time acting wilfully, wantonly and in disobedience to his master's order. And so, on the other hand, an ax, a crowbar, a scythe, and similar implements in daily use, are equally as deadly when improperly used, but no court would hold a master liable for the tortious act of his servant on the ground alone that he had intrusted the custody of such appliance to the servant. No appliance when at rest is 'dangerous in itself.' It is by operation alone that it becomes capable of causing injury. So, in our opinion a better test, though probably not itself without exceptions, of the master's liability, would be whether the agency or appliance, the custody and control of which he committed to his servant's judgment and discretion, was 'dangerous in itself,' or liable to inflict serious injury to others, when operated in the customary method of use, and while being devoted to the purposes for which it was designed. If so, the public safety demands that he shall be answerable for the exercise of his servant's judgment. We are not without eminent authority for this position. 'Whenever a master sends his servant out beyond his own eye and immediate control, in the custody of any species of property of the master which, unless properly cared for, guarded and used, is liable to work injury to third persons, it is necessarily a part of the duty which the master commits to the servant to so care for, guard and use such property that it shall not work such injury.' 1 Thomp. Neg. Sec. 589; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Nashville & C. R. Co. v. Starnes, 9 Heisk. 52, 24 Am. Rep.

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296; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Salisbury v. Erie R. Co., 66 N. J. L. 233, 55 L. R. A. 578, 88 Am. St. Rep. 480, 50 Atl. 117."

The Florida statutes require motor vehicles to be registered—the application for registration to contain the name of the manufacturer, the styles, type and factory number of each vehicle, the character of motor power, and the amount of such motor power stated in figures of horsepower, the name, age, residence and business address of the owner of such vehicles, and a statement that he is over sixteen years of age. He is required to get from the Comptroller two number plates, which shall be conspicuously displayed on the car; no person under fourteen years of age is permitted to operate or drive a motor vehicle unless accompanied by a duly licensed chauffeur, or by the owner of the motor vehicle; upon the sale of a registered motor vehicle the Comptroller must be notified of such sale; they are required to be equipped with adequate brakes in good working order; signaling devices must be provided; lights are required to be used at night and the manner of their use regulated; the rate of speed that they may be operated within or without corporate limits is prescribed; chauffeurs must be licensed, and they are required to pass an examination as to their qualifications, to wear a distinguishing badge, and a penalty is attached for the violation of the provisions of the law. Chap. 7274, Acts of 1917.

It is idle to say that the legislature imposed all these restraints, regulations and restrictions upon the use of automobiles if they were not dangerous agencies which the legislature felt it was its duty to regulate and restrain for the protection of the public.

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As was said in *Ingraham v. Stockamore*, 118 N. Y. Supp. 399, 63 Misc. Rep. 114: "It would seem, from these provisions in reference to the owners of automobiles and those who operate them, that the Legislature regarded automobiles as dangerous machines, and that their owners should be under special liabilities for the manner in which they operate them. No such restrictions have ever been imposed on other methods of transportation on highways. It is absurd to say that an automobile is no more dangerous than a team of horses. The latter have been used time out of mind, and comparatively few accidents have occurred, and those mostly to the ones using the horses. During the few years that automobiles have been in use, fatal accidents have been of almost daily occurrence, and automobiles have come to be regarded in both city and country as a menace to people on the highway. Their rapidity and the stillness of their movements make them especially dangerous to pedestrians. Attempts have been made by law to limit their speed, but it has been impossible to enforce the law. No doubt the Legislature had in mind these facts when making the provisions of the Act. Such provisions, requiring the registrations of the names of the owner and chauffeur and the number of each machine, can have but one purpose—to enable identification of the persons responsible in case of accident.

"An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by any one with his consent. He may not deliver it over to any one he pleases and not be responsible for the consequences." *Christy v. Elliott*, 216 Ill. 31, 74 N. E. Rep. 1035; *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. Rep.

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255; Weil v. Kreutzer, 134 Ky. 563, 121 S. W. Rep. 471, 24 L. R. A. (N. S.) 557.

"While it is quite true that a motor is not an outlaw, it must also be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation." Fisher v. Murphy, 20 Ont. W. R. 201, 3 Ont. W. N. 150. See also Mattei v. Gillies, 16 Ont. L. Rep. 558, 12 Ann. Cas. 970.

Laws similar to Chap. 7275, Acts of Florida, have been sustained by the courts as a legitimate exercise of the police power to regulate agencies that are *dangerous to the public*.

Citations from a few will be enlightening.

"There can be no question of the right of the Legislature in the exercise of the police power to regulate the driving of automobiles and motorcycles on the public ways of the Commonwealth. They are capable of being driven at such a high rate of speed, and when not properly driven are so dangerous, as to make some regulation necessary for the safety of other persons on the public ways." Commonwealth v. Boyd, *supra*.

"The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the Legislature, in the exercise of the police power, to consider the risks that arise from use of new inventions applying the forces of nature in previously unknown ways. * * * In

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choosing his vehicle, everyone must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way." *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. Rep. 848.

"The statute in controversy in the case at bar certainly applies to all drivers of automobiles without distinction, and is, therefore, general as to that class, and, for the reason that such horseless vehicles constitute a source of danger to travelers upon the highway, it cannot be said that the classification is not a reasonable one." *Christy v. Elliott*, *supra*.

"It is scarcely necessary to say that this gives the common council ample authority to enact ordinances which will tend to make streets safe for the traveling public. We may take judicial notice that many of these automobiles may be driven at a speed of at least 40 miles an hour. Driven by indifferent, careless, or incompetent operators, these vehicles may be a menace to the safety of the traveling public. Under its authority to regulate the use of the streets, the city may enact ordinances which will diminish this danger. * * * It is merely a justifiable exercise of the police power in the interest of the safety of the traveling public." *People v. Schneider*, 139 Mich. 673, 103 N. W. Rep. 172.

"The purpose of the legislation is manifest. The Legislature appreciated the danger to pedestrians, and to people lawfully using the highways with vehicles drawn by animals, from automobiles and motor vehicles. Many of these vehicles are capable of attaining a speed of more than a mile a minute, and weigh several tons. This speed averages approximately the speed of the different classes of railroad trains operated by steam power." *People v. MacWilliams*, 86 N. Y. Supp. 357, 91 App. Div. 176.

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In this case it was contended that the statute was unconstitutional because it exempted manufacturers and dealers having automobiles in stock, from the operation of the law, thus discriminating against those who used them on the highways.

The constitutionality of the act was sustained on the theory that while it was necessary for the public safety to require registration of motor vehicles operated on the public highways, it was "unnecessary to require the registration of such vehicles as were held in stock for sale or for repair or on storage in automobile barns and stables." In other words, that an automobile standing in a warehouse or garage is not a dangerous agency—that is "dangerous *per se*"—but when operated on the public highways it is a dangerous agency.

The courts seem to be unanimous on the proposition that for the purpose of the exercise of the State's police power the automobile in operation is a dangerous agency that requires stringent regulatory legislation in the interest of the public safety. Some courts, however, in suits for personal injuries caused by the same agencies, seem to apply a different rule, and hold that they are not dangerous contrivances from which the public is entitled to the protection that would be afforded by the application of the rule governing the liability of the owner of a dangerous agency who permits it to be used by another.

We cannot make that distinction. If the automobile operated upon the public highways is so dangerous to other users of the highways as to require its regulation and control under the police power, it is not divested of its dangerous character in an action for damages caused by the negligence of the operator, and it follows that the rule applying to other dangerous instrumentalities such

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as locomotives and trolley cars should be applied to automobiles when operated on the highways.

The controlling facts in the instant case are undisputed. The car was being operated by an employee of the corporation, with the expressed or implied permission to use it. While attending to a purely personal matter he negligently drove it against the plaintiff in error, thereby causing the injury complained of.

In intrusting the servant with this highly dangerous agency, the master put it in the servant's power to mismanage it, and as long as it was in his custody or control the master was liable for any injury which might be committed through his negligence. This is the doctrine of the common law as applied to a new instrumentality eminently dangerous to the persons using the public highways.

Under the doctrine of this case we find no reversible error, and the judgment is affirmed.

We adopt the concurring opinion of Mr. Justice Whitfield.

TAYLOR AND WHITFIELD, J. J., concur.

ELLIS AND WEST, J. J., dissent.

WHITFIELD, J., Concurring.—The amended declaration herein alleges that the defendant's "automobile was being run and operated by its agent and servant in and upon the streets * * * with the permission of and by the authority of said defendant; * * * that while said plaintiff was riding on a motorcycle and proceeding with due care * * * said defendant's automobile being so

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run and operated by its agent and servant and at a time and place and with the permission and authority of the defendant as aforesaid, and within the scope of his authority as such agent and servant * * * so carelessly and negligently run, drove and operated said automobile, * * * that same violently came in contact with and did strike against with great force and violence, the leg, foot and ankle of plaintiff," etc.

In the absence of controlling statutes the principles of the common law in force in this State are applicable to the operation of vehicles on public highways.

The automobile or motor vehicle is an instrumentality of service whose weight, speed and mechanism make it peculiarly dangerous when in operation on public highways.

Among the principles of the common law that are designed to conserve the public safety, are those that require the exercise of due care in the use on the public highways of instrumentalities that are peculiarly dangerous in their operation, and impose upon the owner of such an instrumentality liability to persons for injuries to them proximately caused by the negligent use of the instrumentality upon the public highways by any one who has the authority or permission of the owner to use or operate it. These principles are applicable to the use of any instrumentality that may be produced by human skill which materially increases the hazards of travel upon the public highways; and the liability of the owner is not limited to the negligence of an employee of the owner while acting within the scope of his employment, but extends to the negligence of any one who uses such instrumentality upon the public highways with the authority or permission of the owner.

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The amended declaration is manifestly drawn on this theory, and the charges of the court comport with this view of the issues and the evidence in the case.

The principles of the common law when applicable, have the force of law, particularly where, as here, the common law of England is by statute expressly incorporated into the laws of the State. A statute may be merely declaratory of the principles of the common law.

The application of the principles of the common law to this case is not contrary to, but is consistent with, statutory regulations of the use of motor vehicles on the public highways in this State.

ELLIS, J., dissenting.

The declaration in this case, consisting of two counts, rests upon the theory that the Southern Cotton Oil Company, a corporation, defendant below, through its "agent and servant," negligently operated an automobile, owned by the defendant, upon the streets of Pensacola so that the plaintiff was injured.

The first count alleges that the automobile was "being run and operated by its (the company's) agent and servant in and upon the streets of the City of Pensacola, County of Escambia, State of Florida, with the permission of and by the authority of said defendant in transporting himself from his lunch in said city to his place of employment, to-wit, the place of business of said defendant," and that while the automobile was being "so run and operated" by the defendant's agent and servant, "and at a time and place and with the permission and authority of the defendant as aforesaid, and within the

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scope of his authority as such agent and servant, to-wit, in transporting himself back to the place of business of said defendant," he carelessly and negligently drove and operated the automobile so that the plaintiff was injured.

The second count alleges that the defendant, the owner of the automobile, "was by its agent and servant driving, operating and conducting same on and upon the streets of the City of Pensacola, County and State aforesaid," and that while the plaintiff was riding a motorcycle at the intersection of Garden and Donelson streets in the city and proceeding with due care, the "defendant by its agent and servant so carelessly and negligently drove, managed and operated said automobile" that the plaintiff was injured, etc.

The case was tried upon the general issue of not guilty, which denied the wrongful act alleged to have been committed by the defendant. See Rule 71, Law Actions.

The facts in the case are undisputed and are set forth in the dissenting opinion in the first decision of this case. See *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 South. Rep. 975.

Upon the second trial the evidence was much clearer that Barrow, the company's cashier, in using the automobile was merely required to make daily trips to the City of Pensacola from the offices of the company, which were located some distance out on Palafox Street, attend to the banking and shipping for the company and after getting lunch for himself return to the company's place of business about one o'clock. That the trip for the young lady took him some distance away from the line of his route back to the offices of the company. In fact in making this trip he was required to leave Palafox

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Street, go out some distance on Garden Street, return to Palafox Street to a point farther away from the offices than where he had eaten his lunch. After arriving at the young lady's house he undertook an errand for her which carried him further away. Upon this latter trip the accident occurred.

The local manager of the company knew that Barrow had frequently before that time used the automobile to take the young lady to her work, but Barrow had never before undertaken in the automobile an extra or special mission for the young lady. The local manager nor any one else for the company had authorized Barrow to make such use of the machine in performing errands for the young lady, or in indulging in his own inclination to be of service in taking her from her house or boarding place to her work.

Now the declaration being framed upon the theory that the wrongful act of the company's cashier, Barrow, casts upon the company liability for the injury, it becomes necessary to a recovery for the plaintiff to show that the wrongful act of Barrow was done in the cause and within the scope of his employment as the company's agent. That issue was the one presented, the only one tried.

The majority opinion upholds the verdict and judgment upon the theory that one who permits another to use an instrument dangerous in its operation is liable in damages for the negligent operation of such instrument, notwithstanding the user was engaged upon an independent errand of his own. But that is not the theory upon which the declaration was framed, nor the cause tried. That was not the case made by the pleadings; nor was it the principle upon which the charges given by the trial court to the jury was framed.

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The view of the judge who tried this case seems from the instructions given to have been that if the defendant's manager knew of Barrow's practice in using the automobile to take the young lady to her work and acquiesced in such practice, then Barrow's departure from his line of duty on the day of the accident could not be considered as an abandonment of his employment, but that he was still acting in the defendant's interest and within the general scope of his authority.

The judgment should not be affirmed upon the theory that the automobile being a dangerous instrument in operation, the defendant must be held liable for any injury resulting from carelessness on the part of one to whom it may have been entrusted as a kind of tortfeasor, because no such case was presented to the court. There should be a recovery only upon the principle of *Respondet Superior* because such is unmistakably the doctrine upon which the declaration rests. To hold otherwise is to reverse the doctrine so often announced by this court that the recovery by plaintiff must be upon the case made by the pleadings.

There may be cogent reasons why the Legislature should impose upon the owners of automobiles the additional liability for injuries caused by the machine when carelessly operated by any person to whom the owner may have entrusted it for the former's pleasure and not the owner's interest, but until the Legislature in the exercise of police power for the public safety so declares, the court should not outstrip the lawmaking body in its effort to meet public opinion.

Nor do I think the judgment should be affirmed upon the theory announced by the trial court in the charge to which I have referred, because the evidence in my opinion

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establishes beyond peradventure of doubt that Barrow was upon an independent errand of his own, or more accurately an independent errand or business of the young lady in whose service he was then acting when the accident occurred.

WEST, J., concurs.

On Petition for Rehearing.

PER CURIAM.—On an application for rehearing it is contended that the effect of the former opinion herein as the law of the case has been overlooked on this writ of error, and that this “court departed from the doctrine announced by it upon its former decision in this same case.” In our former decision we applied the dangerous agency or instrumentality rule, and the defendant in error filed a petition for rehearing in which he said that “this court in holding in the instant case that the dangerous instrumentality or agency rule applies to automobiles in Florida” “overlooked the decision of the courts establishing that an automobile is not a dangerous instrumentality or agency.” The greater part of the petition was devoted to the discussion of that, as “the doctrine of the case,” and we were asked to depart from it on rehearing. The petition for rehearing was denied. A judgment for the plaintiff below on another trial being affirmed by this court, a rehearing is now asked on the ground that this court “departed from the doctrine announced by it upon its former decision in this same case.”

There was no departure from the doctrine of the first case. In both decisions we applied the rule that the superior must respond in damages for the negligent acts of

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persons to whom he intrusts instrumentalities that are dangerous *per se* or dangerous in their use.

In the first petition for rehearing counsel complained that this court held that "the dangerous instrumentality or agency rule applies to automobiles in Florida." They now say, that in the last case wherein we adhered to that rule, that this court "departed from the doctrine announced by it in its former decision in this same case." We call attention to this inconsistency, but refrain from making any comment on it.

Even if the declaration contains allegations that have reference to the doctrine of *respondet superior* as applied to the relation of master and servant, the liability under such doctrine is not foreign to the rule of liability that one who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway, is liable in damages for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one so authorized by the owner. If the plaintiff alleged and endeavored to prove more than was necessary to a recovery of damages, the unnecessary matters may be regarded as immaterial surplusage, where they are not repugnant to or destructive of a right of action that is in substance and legal effect alleged and assumed to be proven, as is the case here.

The former opinion herein clearly indicates this situation in the trial then reviewed and the petition for rehearing then filed in effect complained of this pronouncement in the first opinion.

It is the province of the courts to determine whether an instrumentality of known qualities is so peculiarly

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dangerous in its operation as to invoke the principle of law that the owner thereof is liable for injuries to third persons proximately resulting from the negligent operation of such instrumentality by any one using it with the authority of the owner. And when the court determines that the instrumentality is within the class and principle referred to, that phase of the case is concluded. The question then of liability *vel non* for the particular injury depends upon an appreciation of the evidentiary matters and the principles of law applicable thereto. Error, if any, in determining the peculiarly dangerous character of the instrumentality or in adjudicating liability in a particular case, may be remedied by permissible review proceedings.

The legal rules of liability for the authorized use of peculiarly dangerous instrumentalities are especially applicable to the negligent operation on the public highways, of motor vehicles whose weight, speed and mechanism render the negligent or inefficient use of them perilous to the public who have a right to travel the highways without being subjected to undue dangers of injury by others. If a locomotive engine and a hand car are peculiarly dangerous when operated on a railroad track, certainly a motor car is peculiarly dangerous when operated on public highways. The declaration and the evidence show liability under the law for negligence in the authorized operation of a motor car on the streets.

Even if the allegations and proofs do not show a liability because of the negligence of the defendant's employee while engaged in the scope of his *employment*, both the allegations and the proofs do show liability for an injury caused by the negligent operation on the highway of an instrumentality that is peculiarly dangerous

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in its use, by the defendant's employee while acting with the *authority* and permission given by the manager of the defendant corporation, the owner of the instrumentality having the control of its use. The liability arises for negligence within the scope of *authority*, if not also within the scope of *employment*. This appears in the former opinion.

Rehearing denied.

BROWNE, C. J., AND TAYLOR AND WHITFIELD, J. J., concur.

ELLIS AND WEST, J. J., dissent.

C. A. WILLIAMS COMPANY, A CORPORATION, *Plaintiff in Error*, v. ROBERTS & GEIGER, *Defendant in Error*.

Decision Filed July 5, 1920.

Petition for Rehearing Denied October 27, 1920.

Writ of Error to a Judgment of the Circuit Court within and for the County of Alachua; James T. Wills, Judge.

W. S. Broome and *F. Y. Smith*, for Plaintiff in Error;

Thomas W. Fielding and *Evans Haile*, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of

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the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

C. A. WILLIAMS COMPANY, *Plaintiff in Error*, v. ROBERTS & GEIGER, *Defendant in Error*.

On Petition for Rehearing.

In attachment proceedings the statutory affidavit, and the writ and motions addressed thereto, with the orders made thereon, should on writ of error be evidenced to the Appellate Court in the record proper and not in the bill of exceptions; and where such matters appear only in the bill of exceptions they cannot be considered by the Appellate Court.

Rehearing denied.

W. S. Broome and F. Y. Smith, for Plaintiff in Error;

Thos. W. Fielding and Evans Haile, for Defendants in Error.

PER CURIAM.—The judgment herein was affirmed without opinion. A petition for rehearing has been filed.

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The only assignments of error argued are (1) denying a motion to amend the attachment affidavit by striking a certain portion thereof (2) dissolving the attachment, and (3) denying the motion for a new trial.

In attachment proceedings the statutory affidavit is a part of the record proper and must be evidenced to the appellate court in the record proper and not in the bill of exceptions. *Merchants Nat. Bank of Jacksonville v. Grunthal*, 38 Fla. 93, 20 South. Rep. 809. The writ of attachment is also a part of the record. Motions addressed to an attachment affidavit and to a writ of attachment which are a part of the pleadings, should, with the orders thereon, be evidenced to the appellate court by the record proper and not by bill of exceptions.

In this case the motion to amend the affidavit and the motion to dissolve the attachment together with the orders made thereon, appear only in the bill of exceptions. The grounds of the motion for new trial cover other matters, but the only grounds of the motion that are argued relate to the orders denying the motion to amend the attachment affidavit and dissolving the attachment, which matters should be, but are not, contained in the record proper. For these reasons the judgment was affirmed.

Rehearing denied.

All concur.

Stewart v. Preston et al.—Syllabus.

**HENRY J. STEWART, *Appellant*, v. LAURA L. PRESTON, ET AL,
Appellees.**

Opinion Filed July 10, 1920.

Petition for Rehearing Denied October 18, 1920.

1. The change in the name of a corporation has no effect whatever upon its property, rights or liabilities. It continues as before, responsible in its new name for liabilities previously contracted or incurred, and has the right to sue on contracts made or liabilities incurred to it before the change.
2. After the name of a corporation has been changed it should, by proper averments to show the change, sue and be sued by its new name.
3. The change in the name of a corporation has no more effect upon its identity as a corporation, than the change in the name of a natural person has upon his identity.
4. Where a person is sued by his wrong name he may appear and defend the action by his correct name.
5. Where a person is sued by a wrong name and he appears and submits himself to the jurisdiction of the court by his true name he is not in default, and a decree *pro confesso* should not be entered against him.
6. When a person is sued by a wrong name and appears by his right name, it is proper to amend the pleadings to correspond with the name by which he appears.
7. Where the name of a party is manifestly a charitable, educational or commercial, manufacturing or financial one, such as are usual subjects of incorporation and not one common to copartnerships or individuals, it should import a corporation, and whether it does or not should as a general rule be left to judicial knowledge.

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8. Where a party is sued as a corporation it is not in default because it appears by its name without describing itself as a corporation.
9. Where a party sued by a wrong name wishes to appear and defend on the merits, he may waive his right to plead in abatement, and by appropriate averments, showing that he is the identical party sued, appear and plead to the merits by his true name.
10. Where a motion is grounded on facts that are neither apparent from the face of the record, or papers on file in the case, nor within the judicial knowledge of the court, it must be supported by affidavits or other proof.

An Appeal from the Circuit Court for Alachua County; James T. Willis, Judge.

Orders affirmed.

T. B. Ellis, Jr., for Appellant;

Hampton & Hampton, for Appellees.

JONES, Circuit Judge.—On January 30th, 1918, the appellant filed his bill to remove clouds from title in the Circuit Court for Alachua County against Knickerbocker Trust Company, a corporation, and several other defendants. All the defendants being non-residents of the State of Florida, constructive service by publication was had upon them, the process being returnable on the 4th day of March, 1918. On the return day of the process the following entry of appearance, omitting the venue and style of the case, was filed in the Clerk's office:

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“Appearance of Columbia Trust Company,
(Formerly Knickerbocker Trust Company.)

“Comes now Columbia Trust Company, formerly Knickerbocker Trust Company, by its attorneys, Hampton & Hampton, and appears on this 4th day of March, A. D. 1918.

“HAMPTON & HAMPTON,
“Attorneys for Columbia Trust Co.”
“(Formerly Knickerbocker Trust Co.)”

On the return day of the process the complainant, who is the appellant, filed a praecipe for a decree *pro confesso* against all defendants who fail to appear, but the Clerk refused to enter a decree *pro confesso* against Knickerbocker Trust Company, a corporation. The complainant thereupon on March 21st, 1918, filed a motion to the court to enter a decree *pro confesso* against the Knickerbocker Trust Company for failure to appear, but the Chancellor denied the motion. On the rule day in April, a demurrer to the bill was filed, the introductory paragraph of which is as follows: “Comes now the defendant Columbia Trust Company (formerly Knickerbocker Trust Company) a corporation, by its attorneys, Hampton & Hampton, and files this its separate demurrer to the complainant's bill of complaint herein and for cause of demurrer says:”

* * *

After stating the grounds of demurrer, it was signed by Hampton & Hampton as solicitors for defendant Columbia Trust Company (formerly Knickerbocker Trust Company). On April 5th complainant moved the court to enter a decree *pro confesso* against Knickerbocker Trust Company, a corporation, on the ground that said corporation had failed to appear, plead, answer or demur to the bill, which motion was denied by the Chancellor,

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whereupon, the complainant moved the court to strike from the files the said demurrer because the Columbia Trust Company is not a party defendant to the bill filed, is a mere intruder and has no standing in court. The motion to strike being denied, the complainant appealed and assigned as errors the ruling of the court upon the several motions.

The correct answer to the question which follows, propounded by counsel for complainant, will solve the main issue presented: "Can a person not named as a defendant in a chancery suit appear in that suit, and, by so appearing, prevent the entry of a decree *pro confesso* for failure to appear against one who is named as a defendant in the suit and who failed to appear?"

It is true as contended by complainant that as a general rule a complainant in equity cannot be compelled to litigate with a third party not made by him a defendant to the bill, but the question propounded and the general rule stated have no application to the facts of this case.

It is not apparent that a party not named as a defendant has appeared to the bill. Knickerbocker Trust Company, a corporation, was sued; Columbia Trust Company, in obedience to the court's process, appears, submits itself to the jurisdiction of the court, and in so doing alleges in substance, by the use of the word "formerly," that it is the identical corporation sued, formerly known as Knickerbocker Trust Company.

The language used in the entry of appearance signifies merely a change of name of the defendant corporation, but no change of its identity. The change in the name of a corporation has no effect whatever upon its property, rights or liabilities. It continues as before, responsible

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in its new name for liabilities previously contracted or incurred, and has the right to sue on contracts made or liabilities incurred to it—before the change. After the change it should, by proper averments showing the change, sue and be sued by its new name. The change in the name of a corporation has no more effect upon its identity, as a corporation, than the change in the name of a natural person has upon his identity. 14 C. J. 321; 7 R. C. L. 129; 1 Morawetz on Private Corporations, 354.

If a person is sued and process is served upon him by a right name it is proper to amend the pleadings so as to appear and defend the action, neither is he required to appear by a name not his own; but it is his right and his duty to appear by his correct name. The object of the process of the court is to produce the person, not the name by which he may be sued, in court. Under the old English practice the defendant was required to visibly appear in court, and our method of appearance is only a substitute for the ancient practice. When a person is sued by a wrong name and he submits himself to the jurisdiction of the court by his true name he is not in default and decree *pro confesso* should not be entered against him. See *Moore v. Lewis*, 76 Mich. 300, 43 N. W. Rep. 11. This rule applies to natural persons and corporations alike. *Harvey Lumber Co. v. Herriman & Curd Lumber Co.*, 39 Mo. App. 214.

If a party is sued by a wrong name and appears by his right name it is proper to amend the pleadings so as to correspond with the name by which he appears. 14 Ency. Pl. & Pr., p. 297.

It is argued that the motion for decree *pro confesso* on account of failure to appear should have been granted because in entering appearance Columbia Trust Company

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was not described as a corporation, that the words used were without significance, that they do not show the defendant to be a corporation, co-partnership or an individual. It is a well-settled rule that if the name of the party is manifestly a charitable, educational or commercial, manufacturing or financial one, such as are usual subjects of incorporation, and not one common to co-partnerships or individuals, it should import a corporation, and whether it does or not, should, as a general rule, be left to judicial knowledge. *St. Cecilia Academy v. Hardin*, 78 Ga. 39, 3 S. E. Rep. 305. Without regard, however, to the foregoing rule, it was alleged in the bill that Knickerbocker Trust Company was a corporation, and when Columbia Trust Company, by its appearance, alleged itself to be the former Knickerbocker Trust Co., there was no necessity for further allegation.

The next objection urged by complainant is that if there had been a change in the name of defendant corporation it could not state that fact in the entry of its appearance nor in its demurrer, but the only method by which such fact could be stated was by plea in abatement.

Where a party sued by a wrong name wishes to appear and defend the action on its merit, he cannot be compelled to take advantage of his right to plead in abatement on the ground of the misnomer, but he may waive his right to plead in abatement and by appropriate averments, to show that he is the identical party sued, appear and plead to the merits by his true name.

Where a party sued by a wrong name, by appropriate averments to show that he is the identical party sued, appears and pleads to the merits by his true name, a motion for a decree *pro confesso* for failure to appear by the

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name by which he was sued, and a motion to strike the demurrer or plea on the ground that it was the demurrer or plea of an intruder, are properly denied when there is no proof submitted in support of the motions. The motions made by the complainant were not sworn to nor supported by affidavits or other proof.

Where a motion is grounded on facts that are neither apparent from the face of the record, or papers on file in the case, nor within the judicial knowledge of the court it must be supported by affidavits or other proof. 6 C. J. 635; 126 Am. St. Rep. 30, Note; 20 Standard Proc. 30; Blemel v. Shattuck, 133 Ind. 498, 33 N. E. Rep. 277.

The interlocutory orders appealed from should be affirmed.

PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the Court that the interlocutory orders herein be, and the same are hereby, affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

HENRY J. STEWART, *Appellant*, v. LAURA L. PRESTON *et al.*,
Appellees.

On Petition for Rehearing.

Where a petition for a rehearing does not suggest anything which gives the court reason to apprehend that its judgment is erroneous a rehearing should be denied.

Stewart v. Preston et al.—Opinion of Court.

Petition for rehearing denied.

T. B. Ellis, Jr., for petitioner.

JONES, Circuit Judge.—A petition for rehearing has been filed. All the grounds of the petition except the twelfth and thirteenth were considered by the court in arriving at the conclusion expressed in the main opinion.

The twelfth and thirteenth grounds of the petition are that the court failed to rule on the motion to strike the brief of Columbia Trust Company and that appellant has not had an opportunity to file a reply brief to the brief filed by Columbia Trust Company.

The court's attention was not directed to the motion to strike until after the opinion had been filed, but the motion to strike being based upon the ground that Columbia Trust Company is a mere intruder and has no right to file a brief in this cause presents the same question that was argued fully by counsel for appellant in his first brief and again in his second brief in support of the motion to strike. Both of these briefs have been considered and it is not deemed necessary for a proper disposition of the questions involved that appellant should file a third brief.

The petition does not suggest anything that gives the court reason to apprehend that its judgment, which disposes of the motion to strike along with other questions, is erroneous.

A rehearing should be denied.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

Hall et al. v. Brown—Syllabus.

ALBERT E. HALL AND JOHN D. PERRY, DOING BUSINESS UNDER THE NAME AND STYLE OF BURDETT, SMITH AND COMPANY, *Plaintiff in Error*, v. WILLIAM M. BROWN, *Defendant in Error*.

Opinion Filed July 20, 1920.

Petition for Rehearing Denied October 25, 1920.

1. Where there a distinct acknowledgment in writing of a debt as still subsisting as a personal obligation of the debtor, before it is barred by the statute of limitations, a promise to pay will be inferred.
2. Where there is a direct and unqualified admission in writing of a previous subsisting debt which the party is willing to pay, a promise to pay is raised by implication of law.
3. Where the defendant made several promises 'to liquidate the note,' 'to pay something on it,' 'to pay it as fast as possible,' the promise implied in the statement that he might "be able by the first of July to send you \$500.00," must be taken in connection with these and other statements, and that the \$500.00 was to be a part payment on account of the entire indebtedness which he had repeatedly acknowledged, and not a promise to pay \$500.00 in full settlement of the note.

A writ of error to the Circuit Court for Dade County, H. Pierre Branning, Judge.

Judgment reversed.

A. J. Rose, for Plaintiff in Error;

Atkinson & Burdine, for Defendant in Error.

BROWNE, C. J.—On August 29, 1914, the plaintiff in error as plaintiff below brought suit against the defend-

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ant in error William M. Brown, on a promissory note for four thousand dollars dated October 28, 1907, payable six months after date.

The defendant pleaded the five year statute of limitations. The plaintiff filed two replications setting up in the first that within three years before the commencement of the action, the defendant by certain letters attached to the replication acknowledged the existence of the debt, his liability for and promise to pay it. The second was the same except that it alleged that the acknowledgment of the existence of the debt, his liability for and promise to pay it, was made within five years of the date of the commencement of the suit. These replications were demurred to upon the ground that the statements contained in the letters attached to the replication did not take the debt out of the statute of limitations.

The court sustained the demurrer, and the plaintiff amended his replication by adding to each the words "and plaintiffs aver that the defendant, Wm. M. Brown, is now able to pay said indebtedness." A demurrer to the amended replication was overruled.

The assignments that are determinative will be considered together as they involve the same question—the effect of the letters written by the defendant to rescue the note from the statute of limitations.

On the trial the court admitted in evidence certain letters, written by Wm. M. Brown between the 29th of July, 1911, and March 6, 1914, introduced for the purpose of showing that the defendant had made an express acknowledgment of the debt from which a promise to pay could be inferred.

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In the letter of July 29, 1911, the defendant wrote: "My competitors in digging a hole for me have unconsciously made a pit for themselves and they are about to fall in or let up on me in which event either way the obstacles to my success will be removed and *then* I hope to be able to do something in the matter of my note with you."

"I told her the very moment I could spare a dollar outside of an existence for myself and family my note would be reduced as fast as possible."

On March 29, 1912, he wrote: "I am pleased to say that I am making some headway and hope before long to be able to begin the liquidation of my note."

"I am quite cer (sic) tho by another year my financial condition will improve and then I hope to begin the liquidation of the note."

On April 3, 1918, he wrote: "I delayed answering the first, hoping that when I did reply that I could send you something on the note which you hold."

"I will make you a remittance just as soon as it is within my power. I may be able by the first of July to send you \$500, and will do it if I can. I hate to have to write you this way because if you are really in need of funds yourselves I can imagine the disappointment my letter will bring."

On November 17, 1913, he wrote: "I have been waiting for Mrs. Brown—my wife to return that I might talk over the matter of my indebtedness to you with her."

On March 6, 1914, he wrote: "Re my note \$4,000 to Burdett-Smith & Co. I wrote them last fall that I had an offer to make, but they seemed to think that they

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should have principal and interest which at that time as well as at the present it would be impossible for me to undertake.”

“Of course the note is barred by the statute of limitations, but I am not disposed to repudiate it for that reason providing these people are fair about it.”

We think that these statements constitute an acknowledgment of the debt, and a promise to pay as soon as he was able to do so, and brings them within the rule laid down in *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Clementon v. Williams*, 8 Cranch (U. S.) 72; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309; *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229.

Counsel for defendant in error cites and quotes from a number of cases where certain expressions were held not to take the debt out of the statute of limitations. These, however, all relate to expressions that repel a presumption that the debtor ever intended to pay his obligation, and are not applicable to the facts in this case where we think the letters clearly show an acknowledgment of the debt by the defendant, and a repeated desire and intention to pay it.

On the trial the court gave the following instruction :

“If you find from the preponderance of the evidence that the defendant, Wm. M. Brown, at any time between July 1st, 1913, and April 5, 1915, was able to and could have paid to the plaintiff the sum of \$500.00 then you will return a verdict for the plaintiff in the sum of \$500.00 together with interest thereon at 8 per cent. per annum from the date that you so find that he was able to pay the same, to date,” and refused to give instructions requested by the plaintiff, that if the jury believed from the evidence

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that the defendant had been able at any time from the dates of the several letters to pay the note of \$4,000.00 and interest thereon, they should find for the plaintiff.

The instruction as to the ability of the defendant to pay \$500.00 and the refusal to give the instructions requested by the plaintiff, limited the amount that the jury could find for the plaintiff to \$500.00 with interest.

It was error for the court to so limit the jury in consideration of what amount if any was due the plaintiff on the note sued on. All the statements in the letters which constitute an acknowledgment of the debt relate to a note which was for \$4,000.00 with interest. The promise to reduce the note "as fast as possible;" "the moment he could spare a dollar to do so," related not to part of the indebtedness, but to its entirety as represented by the note. The statement, "I am quite cer—tho (sic) by another year my financial condition will improve and then I hope to begin the liquidation of the note," does not limit the liquidation to five hundred dollars, but relates to the entire indebtedness represented by the note. The note referred to in the letter of April 3d was one of \$4,000.00. The defendant had made several promises 'to liquidate the note,' 'to pay something on it,' 'to pay it as fast as possible,' and the promise implied in the statement that he might "be able by the first of July to send you \$500.00," must be taken in connection with these and other statements, and that the \$500.00 was to be a part payment on account of the entire indebtedness which he had repeatedly acknowledged, and not a promise to pay \$500.00 in full settlement of the note.

We think the court erred in giving the instructions that are the basis of the sixth and eleventh assignments of error.

Choquette et al. v. Dodge—Opinion of Court.

The judgment is reversed.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

ELLIS, J., dissents.

ELLIS, J., dissenting.—I think the judgment should be affirmed because the only definite acknowledgment of the debt and promise to pay was that contained in the letter of April 3, 1918, in which the defendant agreed to pay \$500.00 if he could. There was evidence of his ability to pay.

R. D. CHOQUETTE AND JOSEPHINE CHOQUETTE, HIS WIFE,
Appellants, v. E. E. DODGE, *Appellee*.

Opinion Filed July 27, 1920.

Petition for Rehearing Denied October 19, 1920.

An Appeal from the Circuit Court for Dade County; H. Pierre Branning, Judge.

Price & Price and *Hudson, Wolfe & Cason*, for Appellants;

R. H. Seymour and *A. D. Penney*, for Appellee.

PER CURIAM.—It appears that one Hall and wife conveyed an undivided one-half interest in their homestead real estate to one Armstrong, who, with his family, lived with Hall and his family on the place. By alleged at-

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tachment proceedings against Armstrong a lien was attempted to be placed on Armstrong's interest in the property. and after a sale under execution of Armstrong's one-half interest to Dodge, he brought suit for partition against Choquette and wife, Armstrong and wife having reconveyed their interest to Hall, who conveyed the property to Choquette. Partition was decreed and an appeal taken.

Independent of the question of fraud in the conveyance of a one-half interest to Armstrong and of the asserted failure of consideration for such conveyance, "all of which was well known to the complainant," it is clear that the property was the homestead of Hall or of Hall and Armstrong, and that it was exempt from the asserted lien and execution sale under judicial process. As the asserted process lien and sale did not affect the homestead rights, the sale of the homestead by the owners could not give effect to an attempted lien and subsequent execution sale that were never effective.

Decree reversed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BROWNE, C. J., not participating.

WILLIAM MEEK, *Appellant*, v. CHARLES L. BRIGGS AND
JAMES C. WARR, *Appellees*.

Opinion Filed July 29, 1920.

Petition for Rehearing Denied October 14, 1920.

1. Telegrams or letters to the writer's agent may constitute adequate memorandum of the contract under the statute of

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frauds, and several telegrams, letters or other writings signed by the party to be charged may be considered together in supplying the essential elements of such memorandum as will satisfy the statute.

2. When memorandum under the statute of frauds consists of more than one writing, some of which are signed by the party to be charged and others not signed by him, in order that the unsigned writing or writings may be used to supply the essential elements of the contract there must be some reference to them in the signed writings of such party.
3. Memorandum, in order to make another writing a part thereof so as to constitute a part of the contract, must refer to such other writing, and parol proof of the connection of the papers is not admissible to establish a contract required by the statute of frauds to be in writing.
4. While memorandum of the contract may consist of two or more writings connected by clear reference in one to the other and parol testimony is inadmissible to connect them, it may in such case be resorted to to identify the writing referred to.

An Appeal from the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Grover C. McClure and *S. Grover Morrow*, for Appellant;

Lilburn R. Railey, for Appellees.

WEST, J.—This suit was brought to require the specific performance of an alleged contract to sell real estate. The bill of complaint was demurred to on various grounds. Upon a hearing there was an order sustaining the demurrer and dismissing the bill. From this order an appeal was taken to this court.

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The decisive question in the case is whether the alleged contract of sale or some note or memorandum thereof "in writing and signed by the party to be charged therewith," as required by the statute of frauds, is sufficiently alleged or shown in the bill. Sec. 2517, Gen. Stats. 1906, Compiled Laws, 1914.

The contention is that the listing of the land with an agent of the alleged vendors for sale considered with a telegram and letter of such vendors to such agent stating the terms upon which they were willing to sell and taken together, constitute a sufficient memorandum in writing to meet the requirements of the statute.

Telegrams or letters to the writer's agent may constitute adequate memorandum of the contract, and several telegrams, letters or other writings signed by the party to be charged may be considered together in supplying the essential elements of such memorandum as will satisfy the statute. *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. Rep. 835, 4 Am. St. Rep. 800; *Warfield v. Wisconsin Cranberry Co.*, 63 Ia. 312, 19 N. W. Rep. 224; *Singleton v. Hill*, 91 Wis. 51, 64 N. W. Rep. 588, 51 Am. St. Rep. 868; *Barnett v. McCrea*, 76 Hun (N. Y.) 610, 27 N. Y. Supp. 820; *Little v. Dougherty*, 11 Colo. 103, 17 Pac. Rep. 292; *Olson v. Sharpless et al*, 53 Minn. 91, 55 N. W. Rep. 125; *Elbert v. Los Angeles Gas Co.* 97 Cal. 244, 32 Pac. Rep. 9.

But when such memorandum consists of more than one writing, some of which are signed by the party to be charged and others not signed by him, in order that the unsigned writings or writings may be used to supply essential elements of the contract there must be some reference to them in the signed writings of such party, the established rule being that the signed memorandum

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of the contract must show, either on its face or by reference to some other writing, the contract between the parties so that it can be understood without having recourse to parol proof. *Johnson v. Buck*, 35 N. J. 338, 10 Am. Rep. 243; *Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 706; *Hale v. Hale et al*, 90 Va. 728, 19 S. E. Rep. 739; *Darling v. Cummings et al*, 92 Va. 521, 23 S. E. Rep. 880; *Ward v. Hasbrouck et al*, 169 N. Y. 407, 62 N. E. Rep. 434; *Tice v. Freeman*, 30 Minn. 389, 15 N. W. Rep. 674; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. Rep. 249.

While it is true that when the memorandum consists of two or more writings parol evidence is inadmissible to connect them, it is also true that when there is a clear reference in one of such writings, which is signed by the party to be charged to the unsigned writing, parol evidence may be admissible to identify the writing referred to. *Oliver v. Alabama Gold Life Ins. Co.*, 82 Ala. 417, 2 South. Rep. 445; *Forst v. Leonard*, 112 Ala. 296, 20 South. Rep. 587; *Freeland et al v. Ritz et al*, 154 Mass. 257, 28 N. E. Rep. 226; *Beckwith v. Talbot*, 95 U. S. 289.

The contention of the complainant, appellant here, is that the list of land filed by the owners with their agent for sale, the telegram and letter containing the terms of the contract of sale, considered together constitute sufficient memorandum of the contract to satisfy the statute. The Circuit Judge did not allow this contention and, testing the allegations of the bill by the principles stated, we think he reached a correct conclusion. It is clear that there is no sufficient description of the land in either the telegram or letter. If it should be conceded that the list referred to contains such description, there is no reference whatever to this list in either of the signed papers

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and it cannot, therefore, be considered as a part of the memorandum. Without it there is no sufficient description of the property and complainant's case, upon the theory presented, fails because of the insufficiency of the memorandum of the contract upon which it is predicated.

There was therefore no error in the order sustaining the demurrer and dismissing the bill.

The decree will be affirmed.

TAYLOR, WHITFIELD AND ELLIS, J. J., concur.

BROWNE, C. J., not participating.

ELLIS, J., concurring.—I concur in the conclusion upon the ground that neither the list of property filed with the agent by the defendant nor the telegram nor letter describes the property with sufficient clearness to enable any one to locate it, or identify it.

JAMES^o HENDERSON, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed October 6, 1920.

A dwelling house loses its character as such within the meaning of Section 3281, General Statutes of Florida, providing punishment for breaking and entering a dwelling house, when the occupant leaves it without the intention of returning to occupy it as a dwelling.

A Writ of Error to the Circuit Court for Okaloosa County; A. G. Campbell, Judge.

Henderson v. State of Florida—Opinion of Court.

Judgment reversed.

Walter Kehoe and T. R. James, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant, for the State.

ELLIS, J.—Plaintiff in error was indicted, tried and convicted upon the charge of breaking and entering a dwelling house. The offense was alleged to have been committed on March 1st, 1919. The evidence shows that the person whose dwelling house was entered, according to the allegations of the indictment, did once live in the house, but on the 17th day of February, 1919, he moved from the house which was near Laurel Hill to a house at Culver. When he moved away he left some quilts and clothes and other articles that belonged to his sister in the house, but she had moved away the day before.

Some time in February when the former occupant of the house returned, it is not shown for what purpose, the articles belonging to his sister had been removed. They were afterwards found in defendant's possession, who said that he found them in a woods near his place, that they were in a sack and wet, that he carried them home, spread them on his fence to dry and then took them in the house.

The case is reversed upon the authority of *Smith v. State*, decided at the present term, which holds that a dwelling house loses its character as such within the meaning of the statute providing punishment for breaking and entering a dwelling house if the occupant leaves without the intention of returning to occupy it as a dwelling.

Judgment reversed.

Neicarta v. State of Florida—Syllabus.

MIKE NEICARTA, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed October 8, 1920.

Where there is ample evidence to sustain a verdict of guilty, without considering evidence asserted to have been improperly adduced, a judgment of conviction will not be reversed, where the error, if any, was rendered harmless by the testimony of the defendant, no material or harmful errors appearing in the record.

A Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Judgment affirmed.

G. A. Worley & Son, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant, for the State.

WHITFIELD, J.—Upon an indictment for murder, Mike Neicarta was convicted of manslaughter and took writ of error. The burden of the contention here is that the accused did not understand the English language and was not fully advised of his rights when he made a statement while under arrest as to why he shot the deceased, which statement was testified to by other witnesses. Even if there is any substantial basis in the record for this contention, the accused testified as to the circumstances under which he fatally shot the deceased, claiming justification because of an assault made on him by the deceased, and as on the evidence without the testimony as to the statement, the verdict of manslaughter has sufficient le-

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gal support, the error, if any, in admitting testimony as to the statement, was harmless. No material or harmful errors of procedure appear; therefore, the judgment is affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

JEFF CURLINGTON, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed October 8, 1920.

1. Hogs are within the description of property which is made the subject of larceny under Sec. 3288, Gen. Stats. of 1906, Florida Compiled Laws of 1914, and the larceny of hogs of the value of twenty dollars or more is punishable under this statute.
2. The term "chattels" embraces generally every species of property, movable or immovable, which is less than a freehold.
3. Personal chattels are things movable which may be carried about by the owner, such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another.
4. Upon a charge of larceny where there is conflict in the evidence as to the intent with which the property was taken, or it is of such a character as to legitimately authorize an inference of a felonious purpose, then the matter should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony.

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A Writ of Error to the Circuit Court for Columbia County; M. F. Horne, Judge.

Judgment affirmed.

J. B. Hodges, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WEST, J.—Plaintiff in error, referred to herein as defendant, was indicted, tried and convicted upon a charge of the larceny of hogs of the value of more than twenty dollars. After judgment imposing sentence upon him he took writ of error from this court.

The basis of the first contention of defendant is rulings of the trial court holding inadmissible evidence of a witness for defendant to the effect that defendant's son, Letha Curington, had engaged the witness testifying to search the woods for his hogs, which, it was claimed, had disappeared. This evidence was objected to upon the ground that it was hearsay and was a mere attempt to bolster up the defense by something alleged to have been done by the son of defendant. There was no error in excluding this evidence. What defendant's son may have done, or the fact that hogs of his may have disappeared, could have no material relevancy to the question of defendant's culpability or innocence upon the trial of a charge against defendant for the theft of hogs of the person alleged in the indictment to be the owner. If the loss of hogs by defendant's son is relevant to the issue involved its relevancy is not made to appear by the record.

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It is urged here that there was error in the order overruling defendant's motion in arrest of judgment. As we understand the argument made under this assignment, it is that there is no statute in this State defining the offense of grand larceny of hogs and prescribing a punishment for such offense, and that therefore the sentence imposed upon defendant for the larceny of hogs of the value of more than twenty dollars was without authority. The theory is that since Sections 3302-3, General Statutes, 1906, Florida Compiled Laws, prescribe a penalty for the larceny of hogs of less value than twenty dollars only, there is no penalty for the higher offense. But this theory is not tenable. By Section 3288, General Statutes, 1906, Florida Compiled Laws, a penalty is prescribed for larceny "by stealing of the property of another, any money, goods or chattels or any banknote * * * if the property stolen is of the value of twenty dollars or more." Hogs are within the description of property which is the subject of larceny under the terms of this statute.

In 1 Bouvier's Law Dictionary, 315, the word "chattels" is defined as "Every species of property, movable or immovable, which is less than a freehold. * * * Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, coin, garments, and everything else that can be put in motion and transferred from one place to another." See also 7 Cyc. 122; 2 Words and Phrases 1093; 1 Words and Phrases (2 ed.) 653.

Hogs are chattels within the meaning of that term as employed in this statute and the larceny of hogs of the value of twenty dollars or more is punishable under it.

The order denying defendant's motion for a new trial is assigned as error. Under this assignment the argu-

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ment is that inasmuch as the hogs alleged to have been stolen by defendant were taken openly by him, that there was no effort to conceal them while in his possession, and that he afterwards sold and delivered them in the day time to a neighbor in whose possession they were afterwards found, there is nothing to show a felonious purpose upon the part of defendant and therefore the proof is not sufficient to establish the crime of larceny.

The rule in such cases is that where there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken, or the evidence is of such a character as to legitimately authorize an inference of a felonious purpose, the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony. *Wallace v. State*, 76 Fla. 175, 79 South. Rep. 634; *Bass v. State*, 58 Fla. 1, 50 South. Rep. 531; *Bird v. State*, 48 Fla. 3, 37 South. Rep. 525; *Long v. State*, 44 Fla. 134, 32 South. Rep. 870.

Since the taking was admitted, in view of the testimony of alleged admissions of defendant that "I have hogs strolling all over the woods and I cannot go by the mark, and I just take them up with any kind of mark, and if anybody comes along and claims the ones that I got, I give them up and if they do not claim them I keep them;" that when inquiry was made of him he claimed the hogs as his own, but subsequently said they belonged to his son and later acquiesced in the surrender of them to the owner without any contest, we think there is sufficient proof to authorize a legitimate inference that the taking was felonious. This seems to have been the opinion of the jury who saw and heard all the witnesses, including the defendant, who testified in his own behalf, and there

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is nothing in the record to indicate that the jury were influenced by any consideration outside the evidence. The verdict has the sanction of the trial judge and we will not disturb it.

The judgment is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

JEWELL P. WELLS, ET AL, *Appellants*, v. CHARLES B. WIL-
LIAMS, ET AL, *Appellees*.

Opinion Filed October 8, 1920.

Where under the allegations of a bill of complaint an equity for substantial relief may be shown by appropriate and sufficient evidence, it is error to sustain a general demurrer to the bill.

An Appeal from the Circuit Court for Polk County;
John S. Edwards, Judge.

Decree reversed.

Hilton S. Hampton and *Herbert S. Phillips*, for Appel-
lants;

McKay & Withers, for Appellees.

PER CURIAM.—An amended bill of complaint filed herein seeks to have a trust decreed in real estate and partition thereof made. A general demurrer to the

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amended bill of complaint was sustained and by the order the bill stood dismissed upon failure of complainant to amend within the stated time. Complainants appealed. Without stating the numerous allegations or discussing the law applicable to the points made by the demurrer, it is sufficient to say that under the allegations an equity for substantial relief may be shown by appropriate and sufficient evidence; therefore, the demurrer to the bill of complaint should have been overruled. See *Florida East Coast Ry. Co. v. City of Miami*, 79 Fla. 539, 86 South. Rep. 208.

Reversed for further proceedings.

All concur.

A. C. TYSON, *Appellant*, v. E. L. FENNELL, *Appellee*.

Decision Filed October 8, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Osceola; Charles O. Andrews, Judge.

Milton Pledger, for Appellant;

Johnston & Garrett, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been

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seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

MOLLIE GIBSON LENOIR, BY CHARLES O. LENOIR, HER
NEXT FRIEND AND HUSBAND, *Appellant*, v. CODY D. MC-
DANIEL, *Appellee*.

Opinion Filed October 8, 1920.

1. In a case where a contract containing mutual covenants is not enforceable as against one of the parties by reason of some disability, yet such party performs all the obligations on his part to be performed, the objection of lack of mutuality does not lie.
2. A married woman by reason of her coverture may not make a valid contract of co-partnership, yet she may invest her money or labor in a mercantile business and acquire an interest therein.
3. The exercise of equity jurisdiction for the specific performance of contracts for the purchase of property does not proceed upon any distinction between real estate and personal estate, but depends on the question whether damages at law may not in the particular case afford a complete remedy.

An Appeal from the Circuit Court for Duval County;
George Couper Gibbs, Judge.

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Order reversed.

Baker & Baker and *Wm. T. Stockton*, for Appellant;

Marks, Marks & Holt, for Appellee.

ELLIS, J.—This is an appeal from an interlocutory order sustaining a demurrer to a bill exhibited by Mollie Gibson LeNoir by her next friend and husband Charles O. LeNoir against Cody D. McDaniel. The bill prays for relief as follows: First, that an account be taken of the assets, earnings and property of the business known as the McDaniel Art Shop carried on at 25 West Forsyth Street in Jacksonville, Florida; second, that complainant be declared to be the owner of a one-half interest in the assets, and that the same is her separate property acquired by her as her earnings in an employment; third, that the defendant be required to assign, convey and deed to her a one-half interest in the assets; fourth, that he be required to account to the plaintiff for all monies, bonds, property, stock of goods, fixtures and every description of assets acquired by him in the said business; fifth, that he be enjoined from selling and disposing of the business or removing any of the stock from the premises; sixth, that a receiver be appointed to keep and preserve the assets and carry on the business pending the suit; seventh, that the business be wound up and the "partnership, if any, be declared dissolved," etc.; eighth, and for general relief.

The bill alleged in substance that the complainant is a married woman and over twenty-one years of age, that on April 1st, 1918, the defendant owned the mercantile business conducted at 25 West Forsyth Street in the City

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of Jacksonville known as the McDaniel Art Shop. The character of business is the sale of photographic outfits and supplies, "kodaks" and cameras and accessories used by photographers, development of films of pictures taken by owners of cameras and kodaks, selling stationery, leather goods, pictures, etc.; that in April, 1918, the business was not "making money," was in debt, and the "liquid assets if sold were not sufficient to meet its liabilities." The stock of goods had run down and debts had accumulated amounting to about \$4,118.41 in open account and "bills payable," and the value of the stock did not exceed \$2,500.00. That defendant had no expense in conducting the business he had acquired. That complainant was experienced in such business, and in April, 1918, was keeping books for the business and devoting part of her time to the business. The defendant required her services as manager and buyer for the business which she agreed to and did give. That subsequently he required her to give her entire time and services to the business, which on August 1st, 1918, at his request she did, taking charge of, managing and conducting the business.

The sixth paragraph of the bill is as follows:

"That as an inducement to your oratrix to take charge and manage said business, the defendant promised and agreed to pay her Twenty Dollars (\$20.00) each week as salary, to be charged as an expense of the business, and in the event and as soon as the business had earned Eight Thousand (\$8,000.00) Dollars to assign to her a one-half interest in the business and in its assets. That subsequent to April 1st, 1918, at the request of your oratrix, the defendant gave her a paper writing containing such agreement, a copy of which is hereto attached as Exhibit 'A' and made a part of this bill. But your oratrix fur-

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ther ayers that the agreement contained in said paper writing was made to her prior to said August 1st, when she gave up all other employment and took charge of the management of said business."

The Exhibit "A" is as follows:

"McDANIEL ART SHOP
25 West Forsyth Street,
Jacksonville, Fla., Sept. 21st, 1918.

Mrs. Chas. O. LeNoir,
City.

Dear Madam:

I herewith make you the following offer in regard to an interest in the McDaniel Art Shop: If you will arrange to give your time and attention to same faithfully and regularly I will pay you the sum of \$20 per week as salary, and if you will assist me in every possible way in regard to the management of the business, in consideration of your years of experience in this line of work, I will agree that when our books show that The McDaniel Art Shop shall have earned the sum of \$8,000 net, I will deed over to you a one-half interest in the business without any payment on your part, considering that you have helped in the work sufficiently to equal the payment in cash.

"It shall be understood, however, that if you do not remain in the business until the firm has netted the sum of \$8,000 that you will have no interest in the firm whatever and will be entitled only to your salary.

"Should I sell my interest in the firm at any time before the agreed amount has been made that this agree-

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ment shall be binding upon my successor, so that you may depend upon the reward for your faithful assistance.

“Yours very truly,

“C. D. McDANIEL.”

That complainant diligently kept and discharged every obligation incumbent upon her by reason of her “employment and necessary to accomplish the conditions of said agreement.” That her efforts have been successful, the business has made “handsome profits,” all debts have been paid except a small note given to discount bills. That the business has cash on deposit in the bank, owns real estate, Liberty bonds, has a large stock of goods and excellent fixtures. The stock of goods is worth \$6,000.00. The value of the entire assets of the business exceeds \$15,000.00. That since January 1st, 1919, the defendant has charged off the following items: “Riverview Lots formerly on books at \$796.82; overdrafts by defendant of \$945.55, and \$1,000.00 to the furniture and fixtures account. Defendant charged the business \$35.00 a week for his own services and on January 1st, 1919, owed the business \$945.55 in addition to the amount of his salary. That the said \$945.55 was an asset of the business; that the defendant charged himself with \$400.00 for an auto owned by the business which he has traded for a lot in Riverside worth \$1,000.00,” etc. That the defendant has recently placed in the business as employee a younger brother. The defendant intends to dispose of the business, will not assign to complainant a half interest as he agreed to do, has denied that she has any interest or has any right to an accounting, that in May, 1919, he notified the complainant that he “would not permit her to remain connected with or continue as an employee in the business unless and except she shall surrender the agree-

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ment." That the defendant dismissed her and prevented her from obtaining the benefit of the agreement; that she was at all times ready, willing and able to perform her part of the agreement and would have done so if she had not been discharged by defendant.

The defendant demurred to paragraph six of the bill upon the grounds that the complainant being a married woman the agreement mentioned was void, that it can afford no valid basis to complainant for the recovery and relief sought. This demurrer was overruled. There was a general demurrer to the bill upon the grounds that the complainant is not entitled to an assignment of an interest in the business; the allegation of present value of the business is a "conclusion unsupported by any allegation of fact;" an accounting is unnecessary because complainant is fully advised of the earnings, assets and liabilities; she has an adequate remedy at law; that the contract is invalid because she is a married woman; the bill is "predicated upon an invalid agreement of copartnership and for an accounting and recovery of profits thereunder," and the agreement which is the basis of the case is void. The demurrer was sustained, the chancellor assigning as his reason for the ruling that an accounting is unnecessary because the "complainant was and admittedly is fully advised of the earnings of said business and its assets and liabilities," and if she has any enforceable rights she has a plain, adequate and complete remedy at law. The appeal was from this order.

Exhibit "A" of the bill was a definite proposition made by the defendant to the complainant to pay her twenty dollars per week as salary, and to "deed over" to her a "half interest in the business without any payment on her part" when the books (of the business) showed that

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the McDaniel Art Shop shall have earned the sum of eight thousand dollars net. The proposition was upon condition that the complainant would assist the defendant "in every possible way in regard to the management of the business," and arrange to give her time and attention to the business faithfully and regularly. According to the proposition the defendant considered that if she performed the work required and the business earned eight thousand dollars net, she would have "helped in the work sufficiently to equal the payment in cash." It was stipulated that if she did not remain in the business until the "firm" had netted the sum of \$8,000.00 that she should have no interest in the "firm" whatever and would be entitled only to her salary. The proposition was accepted by complainant, she immediately began work, discharged her part of the obligation and remained with the business, giving it her time and attention faithfully and regularly until the books showed it had earned \$8,000.00 net. Having rendered the service she agreed to render the contract was executed on her part and the obligation of lack of mutuality does not obtain. When the contract was made equity would not have enforced it specifically because of the doctrine of mutuality, the contract required of the complainant services of a confidential and personal nature and it may be equity would not have enforced it at the instance of the defendant. But the services having been rendered the rule does not apply. See 25 R. C. L., p. 232. Even in cases where a contract containing mutual covenants is not enforceable as against one of the parties by reason of her coverture and the party assuming to contract with her is not in equity obliged to perform such contract on his part, yet when the party under disability performs all her obligations under the agreement, equity may compel specific

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performance on the part of the other. Sec. 25 R. C. L.; p. 234; Dickson v. Stewart, 71 Neb. 424, 98 N. W. Rep. 1085; Yerkes v. Richards, 153 Pa. St. 646, 26 Atl. Rep. 221; Newman v. French, 138 Iowa 482, 116 N. W. Rep. 468, 128 Am. St. Rep. 212, 18 L. R. A. (N. S.) 218; Asberry v. Mitchell, 121 Va. 276, 93 S. E. Rep. 638. But it is insisted by defendant that the agreement was void *ab initio*. That is the last ground of his general demurrer, and as if by way of explanation as to why the agreement was void *ab initio* it is pointed out in other grounds of the demurrer that the agreement was a co-partnership agreement and as a married woman cannot enter into a co-partnership agreement, cannot become a member of a partnership, it is argued in the brief of appellee that the agreement was void, and therefore there is no agreement to be specifically enforced. It is true that a married woman by reason of her disability of coverture cannot make a valid contract of co-partnership, but she may acquire an interest in a mercantile business, she may invest money or other property in such business and such interest will be her separate property and subject to be charged in equity and sold under Section 2 of Article XI of the Constitution. See Nadel v. Weber Bros. Shoe Co., 70 Fla. 218, 70 South. Rep. 20.

The proposition of the defendant, McDaniel, was not that he would agree to become associated with her as a co-partner, not that he would establish such relation with her, but that he "would deed over" to her "a one-half interest in the business." There was no impediment whatsoever in the way of the acquisition by her of an interest in the business. She could have acquired it by gift or purchase, she could have bought the interest with money or other property. In the case at bar she undertook to acquire the interest by personal serv-

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ice, she gave not only labor, time and attention, but she brought to the business her experience and ability, and, according to the bill, she rescued the business from failure, she placed it upon a sound financial basis, she displaced its liabilities with assets, she enabled the business to charge off several accounts which were carried as assets and pay off overdrafts of nearly \$1,000.00; she enabled the defendant to pay himself a salary of \$35.00 per week out of the earnings, who prior to her management had practically wrecked the enterprise; in other words, she accomplished by her services all that the defendant believed she could accomplish and for which he was willing to pay her a half interest in the business. Now, was it lawful for her to do this. Could she acquire the interest by paying therefor her personal labor If she could, will equity construe the agreement to be one to accomplish what she might lawfully acquire or construe it as an effort to do that which the law forbids? She could not enter into co-partnership relations with the defendant, but she could acquire an interest in his business. There is no difficulty in the question as to the method of payment. Her services were rendered and defendant accepted them and profited thereby. It does not lie in his mouth now to object. Even if he should say that her husband is entitled to the fruits of her labor, he has brought the suit for her as her husband, in her name, and thereby ratified and sanctioned her claim. The defendant cannot question the contract's validity now that she has performed her part of it, upon the ground that she could not agree to render services to the benefits of which her husband was entitled. That point, if there is anything to it, is for her husband to raise. And Section 2593 of the General Statutes of Florida, 1906, would seem to settle that against him. It provides that

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a married woman's wages and earnings acquired by her in any employment separate from her husband shall be her separate property and subject to her own disposal and she shall be entitled to sue for and recover the same as though she were a single woman. This court has held that the husband's custody and management of the wife's property under the statute continues only so long as the arrangement is agreeable to her. See *Florida Citrus Exch. v. Grisham*, 65 Fla. 46, 61 South. Rep. 123.

Now the earnings acquired by the complainant under her agreement is a half interest in the McDaniel Art Shop business, which according to the allegations of the bill admitted by the demurrer consists of assets both real and personal. The business in which she was to hold a half interest by deed from the defendant, is one the value of which depends not only upon the actual cash value of the personal property and real property owned by it, but upon many other conditions, such as location, good will, established trade, reputation, managerial qualities, etc. If the allegations of the bill are true the last mentioned element of value is not the least important. By her experience, skill and ability she seems to have accomplished results extraordinarily profitable. It was in a business rejuvenated by her remarkable profit getting abilities that she became and was entitled to a half interest. No adequate remedy at law is afforded her for the defendant's breach of the contract. What would be the measure of her damage? The shelf value of the merchandise, the depreciated value of the accounts or bills receivable which under her management might be worth par? The contract was not for a certain interest in merchandise, but an interest in a business to which her personal service gave a peculiar value and character. Under such cir-

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cumstances equity will compel specific performance. The case is analogous to that of a purchaser of stock in a corporation when his control or his ability to prevent control by antagonistic interests gives the stock a peculiar value. See *Bumbardner v. Leavitt*, 35 West Va. 194, 13 S. E. Rep. 67; *Hubbard v. George*, 81 West Va. 538, 94 S. E. Rep. 974, L. R. A. 1918-C, 835.

The exercise of equity jurisdiction for the specific performance of contracts for the purchase of property does not proceed upon any distinction between real estate and personal estate, but dependant on the question whether damages at law may not in the particular case afford a complete remedy. See 25 R. C. L. p. 294.

In the case at bar the complainant remained in the service of defendant until he discharged her and repudiated the contract. Her services had produced the result contemplated, the contract was in writing, answered the requirements of the statute of frauds and was for an interest in a business rendered of peculiar value by her personal management. His breach of the contract entitles her to its specific performance. The accounting is merely ancillary to compel relief. The case is in nowise analogous to or controlled by *Mills v. Joiner*, 20 Fla. 479.

The allegations of the bill are not perfectly clear in one particular, and that is as to the books of the business showing that it had "earned the sum of \$8,000.00 net." From different allegations, however, it may be legitimately inferred that such is the case. It is alleged that when complainant took charge under the agreement the business owed about \$4,118.00 on "open accounts" and "bills payable." That now "every debt, bill and bill payable has been paid except a small note given to raise

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money to discount bills has not been paid." That the value of the stock of goods is \$6,000.00, and the value of the entire assets of the business exceeds \$15,000.00. It is not reasonable to infer even against the pleader that the small note given to raise money to "discount" bills exceeds in amount the value of the stock of merchandise. But if it equaled it there would be left a value of \$9,000.00 net.

The order of the Court is reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

W. D. McADOO, *Appellant*, v. PINELLAS COUNTY, ET AL.,
Appellees.

Decision Filed October 8, 1920.

An Appeal from a Decree of the Circuit Court within
and for the County of Pinellas; O. K. Reaves, Judge.

Roy V. Sellers, for Appellant;

Cook & Harris and *Davis & Harris*, for Appellees.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is,

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therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

CARLTON-MOORE COMPANY, A CORPORATION, *Plaintiff in Error*, v. E. L. VANDERIFE, *Defendant in Error*.

Opinion Filed October 8, 1920.

After a trial on the merits without objection and verdict upon the matters embraced in the declaration and plea, the mere absence of a similliter to the plea is not alone ground for reversal, the similliter not having been insisted upon by the defendant nor required by the court. Failure to file a similliter in such case is waived by going to trial.

A Writ of Error to the Circuit Court for Manatee County; O. K. Reeves, Judge.

Judgment affirmed.

E. Bradley, for Plaintiff in Error;

W. L. Kimball, for Defendant in Error.

WEST, J.—In an action upon a contract for the sale and delivery by plaintiff to defendant of a number of crates of cabbage produced by plaintiff the verdict and judgment were for plaintiff and defendant took writ of error from this court.

The execution of the contract, performance by plaintiff, its breach by defendant, and consequent damage and

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injury to plaintiff were duly alleged in the first count of the declaration. The declaration also contains several common counts in assumpsit.

To the declaration an amended plea in the following language, omitting formal parts, was filed: "That it is true that the plaintiff and defendant did at the time and place as is alleged in the declaration, enter into a contract as is set out in said declaration; but the defendant states that after they had entered into this contract, and before the bringing of this suit, and before the 5th day of April, A. D. 1918, and before any more of the cabbage mentioned in the contract on which this action is based had matured or was ready for market, except the 1350 hampers mentioned in the plaintiff's declaration, which the defendant received and paid for, and before the plaintiff had delivered or offered to deliver any more cabbage to the defendant F. O. B. at Oneco, Florida, or anywhere else, the plaintiff and defendant made and entered into another contract, as follows: The plaintiff released the defendant from the contract between them, the one on which this suit is brought, upon the consideration of the \$350 that was advanced by the defendant becoming the property of the said plaintiff, without the plaintiff having to deliver any cabbage or other thing of value to the defendant, and upon the defendant paying the plaintiff the sum of 75 cents per hamper for the 1350 hampers of cabbage which the plaintiff had delivered to defendant, and the further consideration that the plaintiff have the right to sell the remainder of the cabbage covered by the contract on which this suit is brought to whoever he desired; to all of which the defendant agreed and complied with then and there by paying the plaintiff the 75 cents per hamper for the 1350 hampers of cabbage delivered by the plaintiff prior to that time, and per-

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mitting plaintiff to retain as his own the \$350.00 advanced by the defendant, and also agreeing and permitting the plaintiff to have outright and absolute the remainder of the cabbage. To all of this the plaintiff and defendant agreed, and the defendant never heard anything to the contrary from the day they made and executed said agreement until the filing of this suit."

There was a plea of never was indebted to the common counts.

After the trial of the cause and verdict for plaintiff there was a motion for a new trial. This motion was denied. One ground of the motion is that "plaintiff having failed to file any replication to defendant's plea or amended plea, therefore there was no issue for the jury to try, consequently the verdict is void." In the order denying this motion the trial judge said: "The parties went to trial without suggesting that the issues were not properly made up and the issue presented to the jury was whether the contract sued on had been discharged by subsequent parol agreement alleged in the plea, evidence was offered, and received without objection touching that issue, and it was as fairly presented and tried as if a formal joinder of issue had been filed. Under such circumstances defendant should not be heard to complain, his only point is lack of form, not substance. The decisions of our court on which he relies all antedate Chap. 6223, Acts of 1911, which seems peculiarly applicable to this case."

It is insisted that there is error in this order. No other question is presented.

The amended plea admits the execution of the contract sued on and avers a release from it upon a stated consideration. No reply except a joinder of issue was neces-

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sary to put the averments of this plea in issue. There is no bill of exceptions in the record, but from the order of the trial judge it appears that the parties went to trial without any suggestion of the absence of a joinder of issue on the plea; that "the issue presented to the jury was whether the contract sued on had been discharged by the subsequent parol agreement alleged in the plea, evidence was offered, and received without objection, touching that issue and it was as fairly presented and tried as if a formal joinder of issue had been filed."

There was no error in the order denying the motion for a new trial. The rule applicable in such cases has been frequently stated by this court to be that after a trial, without objections, on the merits and verdict upon the matters embraced in the declaration and pleas, the mere absence of a similiter to the plea is not alone ground for reversal, the similiter not having been insisted upon by the opposing party or required by the court. *Huling v. Florida Savings Bank*, 19 Fla. 695; *Livingston v. Anderson*, 30 Fla. 117, 11 South. Rep. 270; *St. Johns & Halifax R. R. Co. v. Shalley*, 33 Fla. 397, 14 South. Rep. 890; *Herman & Co. v. Williams, Exr.*, 36 Fla. 136, 18 South. Rep. 351; *Barrs et al v. Brace*, 38 Fla. 265, 20 South. Rep. 991; *Glove Theater v. Watt*, 62 Fla. 196, 57 South. Rep. 201.

Under the circumstances recited in the order denying defendant's motion for a new trial, which, in the absence of a bill of exceptions, is conclusive here, the defendant will be deemed to have waived a joinder of issue upon his amended plea. 31 Cyc. p. 733; *Illinois Life Assn. v. Welles*, 200 Ill. 445, 65 N. E. Rep. 1072; *Comer v. May*, 107 Ala. 300, 19 South. Rep. 966; *Slaydon et al v. McDonald*, 82 Miss. 504, 34 South. Rep. 357; *Citizens Bank*

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v. Bolen, 121 Ind. 301, 23 N. E. Rep. 146; Updegrass v. Marked Tree Lbr. Co., 83 Ark. 154, 103 S. W. Rep. 306; Chicago, etc., R. Co. v. Frazier, 66 Kan. 422, 71 Pac. Rep. 831.

The judgment will be affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

W. H. MILTON, *et al.*, AS TRUSTEES, *Plaintiffs in Error*, v.
JACKSON COUNTY, *Defendant in Error*.

Decision Filed October 8, 1920.

A writ of error to a judgment of the Circuit Court within and for the County of Jackson; C. L. Wilson, Judge.

Wm. B. Farley, for Plaintiffs in Error;

John H. Carter, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and brief and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Richardson v. Varn—Syllabus.

JOSIAH RICHARDSON, *Appellant*, v. L. B. VARN, *Appellee*.

Opinion Filed October 8, 1920.

Petition for Rehearing Denied November 29, 1920.

1. In an appeal from a decree in chancery on the merits of a cause, the burden is upon the appellant to make it clearly to appear that the decree was erroneous in order to obtain a reversal.
2. Specific performance of a contract for the sale of lands is not a matter of right in either party, but a matter of sound discretion in the court, controlled by settled principles of law and equity applicable to the particular facts.
3. A contract for the conveyance of lands when executed by a married woman should be acknowledged by her in accordance with the requirements of the statute provided in such cases.
4. Specific performance of a contract for the conveyance of land which provides in the alternative for the conveyance of an undivided half interest or a conveyance of a certain part of the land and division fences as the parties might agree upon, cannot be obtained in the absence of any showing of an agreement between the parties as to a division of the lands, the location of lines, or some facts showing the complainant's right to an undivided half interest.

An Appeal from the Circuit Court for Hernando County; W. S. Bullock, Judge.

Decree affirmed.

G. C. Martin and *H. S. Hampton*, for Appellant;

F. B. Coogler and *F. L. Stringer*, for Appellee.

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PER CURIAM.—Josiah Richardson and L. B. Varn entered into a written agreement in January, 1910, whereby Richardson agreed to drain a certain prairie in Hernando County owned by Varn by such means as Richardson might “see fit to use, within a period of forty-eight months” from the date of the agreement, and to render the prairie “fit for farming purposes as far as surface drainage is concerned.” This work was to be done at Richardson’s expense. There was excepted from the territory to be drained certain portions known as Irvine Lake and several sinks located on the prairie, Varn agreed that Richardson should have all “rights of ingress and egress to, from and across said land during the said term for the purposes of this contract,” and when the “drainage operation is completed” to convey to Richardson, his heirs and assigns by warranty deed “an undivided one-half interest in and to all untimbered portions of said prairie, together with the wooded island thereon, also Irvine Lake, or convey to said party of the first part (Richardson) and to his heirs and assigns forever one-half of said prairie in such manner as may be agreed upon between the parties hereto, and further to furnish timber for all fence posts of live oak, lightwood or mulberry for boundary and division fences.”

Clara S. Varn, wife to L. B. Varn, was a party to the agreement, but did not acknowledge the instrument according to the requirements of the statute.

In October, 1914, Richardson exhibited his bill of complaint against Varn. After demurrers sustained to the original and amended bills of complaint, Richardson filed his second amended bill alleging that he had completed the contract in August, 1914, and exhibited his work to Varn who expressed himself as satisfied therewith;

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“whereupon,” the complainant “requested of the defendant that he convey, in accordance with the terms of the contract, the lands therein described to which your orator (Richardson) is entitled, but the defendant then and there refused, seeking to take advantage of the valuable improvements placed upon his land” by Richardson. It was alleged that the complainant at the time of entering into the contract was let into the possession of the lands and is now in possession. The prayer was for a decree that the “defendant do convey to your orator by warranty deed of conveyance in which his said wife shall join, an undivided one-half interest in and to the lands described in this bill of complaint,” etc., “and in the event the said defendant shall fail or refuse to procure the joinder of his said wife in said conveyance, that your orator may by proper decree have credit for his failure of title *pro tanto*.” There was a prayer for injunction against annoyance of the complainant by actions at law, and a prayer for general relief. Mrs. Varn was not made a party to the bill.

The defendant answered after several motions to strike portions of his first and second amended answers were sustained, denying that the complainant had complied with the “terms and conditions” of the contract, and denied that the “complainant did ever drain said prairie lands in accordance with the terms of the agreement” between them, but averred that the “complainant failed to drain said prairie lands so that same, or any appreciable part thereof would be fit for farming purposes as was contemplated by the parties.” The answer admits that in August, 1914, complainant exhibited the work to the defendant, but denies that he expressed himself as satisfied with it; but on the contrary he expressed himself as

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dissatisfied with the work and stated to the complainant that the prairie was not drained and not fit for farming purposes.

The answer contained a demurrer upon eight grounds, which, in substance, are as follows: That the bill seeks to enforce a verbal contract for the conveyance of land; that the written contract for the conveyance of land was supplemented, according to the allegations of the bill, by a verbal contract, in which time was of essence; that the complainant has an adequate remedy at law; the bill seeks to obtain a conveyance from defendant's wife, contrary to law; that the written contract was in the alternative, but the bill fails to show any agreement of division between the parties; that the bill does not allege that the defendant refused to comply with the alternative, and that the bill is insufficient.

A great deal of evidence was taken in the case on behalf of the parties, and at the final hearing the chancellor denied the relief prayed for on the merits, sustained the demurrer to the bill and dismissed it. From that decree the complainant appealed.

The decree of the chancellor is not shown by the record to have been erroneous on the merits, nor does the order on the demurrer appear to be erroneous. It would be unproductive of any benefit to quote the evidence or to discuss the methods used by witness in complainant's behalf to ascertain whether the land had been drained and made fit for farming purposes as far as surface drainage is concerned. It is sufficient to say that after reading the record, consisting of two large volumes of typewritten matter, much of the testimony being irrelevant, immaterial and unnecessary, we fully agree with the chancellor's findings of fact and his conclusions on the merits.

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It has many times been held by this court that unless the decree on the merits shall clearly appear to have been erroneous it will not be disturbed. See *City of Jacksonville v. Huff*, 39 Fla. 8, 21 South. Rep. 774; *Lucas v. Wade*, 43 Fla. 419, 31 South. Rep. 231; *Farrell v. Forest Inv. Co.*, 73 Fla. 191, 74 South. Rep. 216; *Mock v. Thompson*, 58 Fla. 477, 50 South. Rep. 673; *Guerra v. Guitierrez*, 66 Fla. 570, 64 South. Rep. 232; *Williams v. Bailey*, 69 Fla. 225, 67 South. Rep. 877.

In the case at bar, considering the rule which obtains in proceedings of this character, that specific performance of a contract for the sale of lands is not a matter of right in either party, but a matter of sound, reasonable discretion in the court, that the evidence is by no means clear that the lands had been drained "so as to render them fit for farming purposes" within the meaning of that clause in the contract, construed with reference to the condition of the lands before the agreement was made, and the alternative feature of the contract relating to the conveyance by the defendant of an undivided half interest or a deed to a specific part of the land in "such manner as may be agreed upon between the parties," it is impossible to perceive how the chancellor could have reached any other conclusion than that expressed in his decree.

Time was not considered to be of the essence of the agreement. The complainant, according to the bill and admissions of the answer, claimed to have complied in all respects with the terms of the contract about May 30, 1914. The contract was entered into January 7, 1910, and allowed forty-eight months in which to complete the work. The chancellor did not regard the complainant's failure to complete the work within the time limit as in anywise affecting his rights, nor do we.

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After the commencement of the suit the complainant did a great deal of work in comparison with what he had done before in executing his plan of drainage to prepare as he said for "unprecedented extraordinary floods and rains such as we had last month," etc., yet in 1916 and 1917 it appears from the evidence that the land was overflowed and much damage was done to the crops which had been planted on portions of the land, mainly, if not entirely, at the south end, while there appears to have been little or no effort to drain the northern end of the prairie, except such as might result from opening wells in the southern end to act as receptacles or reservoirs for the surplus water flowing from the north. See also *Gaskins v. Byrd*, 66 Fla. 432, 63 South. Rep. 824; *Murphy v. Hohne*, 73 Fla. 803, 74 South. Rep. 973; *Drake Lumber Co. v. Branning*, 66 Fla. 543, 64 South. Rep. 263.

There are other features of the case which it is unnecessary to discuss, but which considered as a part of the cause presented to the court tend to emphasize the reason for the rule that the matter of a decree for specific performance rests in the discretion of the chancellor as controlled by settled principles of law and equity applied to the particular facts. *Drake Lumber Co. v. Branning*, *supra*.

The contract was unenforceable as to Mrs. Varn, yet complainant seeks to enforce it against her, or require defendant to make due allowance for the value of her dower interest. The contract provided for a conveyance of an undivided half interest or a conveyance to a certain part and division fences as the parties might agree upon, yet there appears to have been no agreement between them as to a division; the defendant's possession was not of the character which is given to one in contemplation of a

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conveyance to him of the fee, it was merely a license to go to and from and over the land that he might carry on his work of reclamation, yet the defendant holds possession as owner and attempts to convert his license into a possession under the agreement.

We think that the chancellor's decree was without error, and the same is hereby affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

J. H. HOLLY AND MAGGIE A. HOLLY, HIS WIFE, *Appellants*,
v. GAINESVILLE NATIONAL BANK, A CORPORATION,
Appellee.

Opinion Filed October 11, 1920.

1. A judgment creditor before proceeding in equity to subject equitable assets of his debtor to the payment of the judgment debt must pursue his legal remedies to every available extent and have a return of the execution that no goods of the debtor are to be found, if such is the case.
2. H agreed in writing to buy certain lands from S, part of the purchase price was paid in cash, and the remainder was to have been paid in several yearly installments. He entered into possession of the lands and made improvements, but was unable to complete his payments. His wife with money of her own and that which she borrowed from relatives and friends took over the contract to purchase the lands and paid the amount due, which with principal and interest amounted to the purchase price originally agreed to be paid by H. *Held*: That H had no equitable interest in the land which could be subjected to sale under a creditor's bill for the payment of his judgment debts.

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An Appeal from the Circuit Court for Alachua County;
James T. Wills, Judge.

Decree reversed.

Hampton & Hampton, for Appellants;

W. S. Broome, for Appellee.

ELLIS, J.—The Gainesville National Bank in October, 1918, commenced a suit in equity against J. H. and Maggie A. Holly to declare a certain tract of land to be held by Maggie A. Holly in trust for her husband J. H. Holly and subject to the lien of certain judgments at law which the complainant had obtained against D. H. Grace and J. H. Holly as copartners using the name of D. H. Grace & Company during the fall of 1915, and against Monroe Venable and J. H. Holly during the fall of the same year. These judgments aggregating in amount the sum of thirty-six hundred and ninety-seven dollars and seventy cents principal. It is alleged that executions were issued upon these judgments and placed in the hands of the sheriff for the purpose of being executed.

As to the execution against D. H. Grace & Company it is alleged "that the sheriff of Alachua County, Florida, has never been able to discover or find any assets or property of whatsoever kind belonging to the said *firm* of D. H. Grace & Company upon which a levy could be made under the judgment and execution against the said D. H. Grace & Company, and your orator avers that said judgment is still unpaid and that said execution in the hands of the said sheriff issued thereon is unsatisfied and that nothing thereon has been paid."

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As to the execution against Monroe Venable and J. H. Holly, it is merely alleged that it is "now in the hands of said sheriff as hereinbefore recited, is unpaid and is unsatisfied, and that nothing has been paid upon said judgment or execution."

It is alleged that in October, 1917, A. C. Steenburg and wife conveyed to Maggie A. Holly the lands sought to be subjected to the lien of the above-mentioned executions. They consisted of four sections in Alachua County. It is alleged that the lands were paid for with money belonging to J. H. Holly, who had the conveyance made to his wife to avoid the payment of the judgments, which the complainant bank held against him. The defendants answered severally. J. H. Holly admitted that the judgments were obtained as alleged in the bill and that they are unsatisfied; that A. C. Steenburg and wife conveyed the lands to Maggie A. Holly, but denied that he paid for the land or that it was conveyed to his wife to avoid the payment of the judgments mentioned. He averred that the money used by his wife to pay for the land was her separate statutory property, part of it was borrowed by her from H. E. Taylor and a mortgage given to him upon part of the property to secure its payment; that the greater part of the money was borrowed by her from her brother, B. J. Massey, of New Brockton, Alabama, and a mortgage was given to him upon two sections of the land to secure the debt due to him; that no part of the money belonged to him, and that he has no right, title or interest in the land. The answer incorporated a demurrer to the bill for want of equity.

The answer of Mrs. Holly contained very much the same averments, and disclaimed any knowledge of the allegations of her husband's indebtedness to the bank and the

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unsatisfied judgments. She also denied that the money which was paid for the land belonged to her husband, but that she borrowed it from her brother and H. E. Taylor and gave them mortgages upon part of the property to secure the payment of the same. There was also incorporated a demurrer to the bill in her answer for want of equity.

An examiner was appointed to take testimony and report the same to the court. Upon final hearing the court decreed that Steenburg and wife sold the land to J. H. Holly for the sum of twelve thousand dollars, that Maggie, his wife, paid ten thousand dollars of that sum, and that her husband paid two thousand dollars of the purchase money and he has an interest to that amount in the land which the court valued at twelve thousand dollars. It was decreed that the bank recover from the defendants, J. H. and Maggie A. Holly, the sum of two thousand dollars, together with costs, and fixed a time limit in which the sum decreed should be paid; that in default of the payment of the sum decreed to be paid that the land should be sold, or a sufficient portion thereof, to satisfy the sum of two thousand dollars and costs and interest, and that he hold any overplus to await the further order of the court. From this decree the defendants appealed.

The errors assigned are that the court found the fact to be that Steenburg sold the land to J. H. Holly for \$12,000.00; that J. H. Holly paid \$2,000.00 of the purchase money; that the bank should have and recover from J. H. and Maggie Holly the sum of \$2,000.00, with costs, etc.; that a master should sell the land, or a sufficient portion thereof, to satisfy the decree; the rendering of the final decree; refusing to dismiss the bill upon the

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defendants' demurrers because there was no allegation of insolvency of the defendants in execution, nor that the executions were ever returned *nulla bona* by the sheriff nor was there any proof thereof.

The allegations of the bill as to the failure to realize upon the executions against Grace & Company and Venable and Holly are not sufficient to justify the relief prayed for, nor does the testimony show that any return had been made by the sheriff prior to the filing of the bill sufficient to satisfy the rule. This was not a case in which the title to the land was ever held by J. H. Holly and conveyed by him in fraud of his creditors, but one in which the title was never in him, but alleged to be held by his wife on a secret trust for him. The evidence shows that the title was never in him, but that in August, 1910, A. C. Steenburg and wife by a written agreement entered into with J. H. Holly agreed to sell to him two sections of the land for the sum of \$6,400.00, of which they acknowledged receipt of \$1,280.00, the remainder to be paid as follows: \$1,000.00 on the 1st of January of each of the following years: 1912, 1913, 1914, 1915, and the remainder on January 1st, 1916. They also agreed to sell to him the other two sections of land on January 1st, 1911, for the same price, \$6,400.00, provided they had not sold before that date. The original document was transmitted by order of the court below to this court, but it serves no especial purpose except to show that from the perplexing figures written upon the back that in 1917 there was a greater sum due on the contract for principal and interest than was due in August, 1910. In October, 1917, Steenburg and wife, by their attorney in fact, conveyed the land to Maggie Holly, the consideration expressed was \$10.00 and other valuable considerations. The execution of this deed was acknowledged by the attorney in fact

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for the grantors in April, 1918, and was recorded during the same month. According to the testimony of A. O. Steenburg, the attorney in fact for the grantors, the amount paid at the time was \$12,000.00. That \$10,000.00 of that sum was money borrowed by Mrs. Holly from her brother for the purpose of buying the land, the court found to be the fact from the evidence adduced. There was evidence tending to show that the remaining sum of two thousand dollars was borrowed by Mrs. Holly from H. E. Taylor, both Mr. Holly and Taylor testified to this fact, and that testimony was uncontradicted. Mrs. Holly also testified that before she paid the \$12,000.00 to Steenburg she had made other payments to him in cattle which she had purchased with money derived from the sale of a tract of land at Kanapaha. This land she purchased at a sheriff's sale in December, 1916. The cattle had been mortgaged by J. H. Holly to the First National Bank in December, 1914, to secure a debt of \$9,400.00 That mortgage was assigned to Mrs. Holly by the bank in May, 1917, after some of the cattle of which there were about 1,200 head, had been sold by the bank and applied on the indebtedness of J. H. Holly. C. I. Baird was the purchaser and bought the cattle in September, 1916. There was some confusion about this part of the evidence, and Mrs. Holly was recalled and explained that the cattle which she delivered to Mr. Steenburg were not the cattle which she acquired from the bank, but cattle which she had owned for many years under a certain mark and brand. But, however this may be, the fact was shown that when the contract for the sale of the land matured, J. H. Holly, who may have made large payments upon it, was unable to carry out his agreement, and Mrs. Holly took it over with Steenburg's consent and paid the balance due. It cannot be said from this

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State of facts that J. H. Holly had any interest whatsoever in the land. If Mrs. Holly had not produced the money, \$12,000.00, to pay the balance due upon the contract, how could J. H. Holly have recovered from Steenburg the money paid by him and the value of the improvements made upon the place? Certainly he had no interest in the land and could not compel a conveyance to himself of any part of it.

The endorsements made by the sheriff upon the executions which were offered in evidence were sufficient to show no property to be found of J. H. Holly upon which they could be levied, but that endorsement seems to bear date of November 23, 1915, the date upon which they came to his hands, but his testimony shows that the return of "*nulla bona*" must have been made at some other time because he testified that at one time, presumably after the executions came to his hands, he went to see Mr. Holly and at another time he sent a deputy from Archer to make some investigations about cattle which he had heard were owned by Mr. Holly. The allegations of the bill do not show that the complainant exhausted his legal remedies, and the property which he seeks to subject, according to the evidence is not affected by such a fraudulent transaction as that the conveyance could be treated as a nullity, the title never having been in J. H. Holly. The complainant's judgments were never a lien upon the land described. His interest, if any, was merely an equitable asset. And if he had the title made to his wife to hinder, delay and defraud his creditors, equity will regard the conveyance as inoperative on account of the fraud, but before the complainant can resort to equity in pursuit of such an equitable asset in aid of an execution he must have pursued his legal remedies to every available extent and have a return of his

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execution *nulla bona*. This doctrine was announced in the case of Robinson v. The Springfield Co., 21 Fla. 203. See also Neubert v. Massman, 37 Fla. 91, 19 South. Rep. 625. In the latter case the court, speaking through CIRCUIT JUDGE MALONE, sitting as a justice of this court, said: "Before a court of equity will extend its aid in such cases the judgment creditor must have exhausted his remedies at law by suing out execution and having a return *nulla bona* made thereon by the proper officer. Then and not before he may successfully invoke the aid of equity to reach equitable assets. Robinson v. Springfield Company, 21 Fla. 203; Richardson v. Gilbert, 21 Fla. 544; Freeman on Executions, Sec. 428. The plaintiffs, Gomm & Leffler, had not sued out execution on their judgment and caused a return of *nulla bona* to be made thereon at the time of filing the original bill, therefore they were not entitled to any relief in a court of equity, and the demurrer should have been sustained as to them."

In that case the judgment debtor had bought and paid for the land and had the title taken in the name of another. In the case at bar the judgment debtor had not bought, nor had he paid for the land. He had merely agreed to buy, made some payments thereon, was unable to complete his contract and faced a loss of land and payments because of his default. His equity, if any, does not appear from the evidence to have been of any value.

If some stranger had with his consent at this point in the transaction taken over the contract and paid Steenburg the balance due and taken a conveyance to himself, upon what principle could the property be subjected to the payment of the judgment of complainant in the absence of a showing of fraud existing between Holly and the grantee to hinder and delay the creditor?

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The bill should have been dismissed upon the final hearing because of the insufficiency of its allegations in the matter discussed and the insufficiency of the evidence to support any theory of fraud perpetrated by the defendants upon the complainant. So the decree is reversed with directions to dismiss the bill.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
CONCUR.

ADOLPH STEINHARDT, TRADING AS STEINHARDT & COMPANY,
Plaintiff in Error, v. CONSOLIDATED GROCERY COMPANY,
A CORPORATION, *Defendant in Error*.

Opinion Filed October 11, 1920.

1. In an action for damages for breach of a warranty a plea which avers that the parties had agreed to settle by arbitration any differences arising from the transaction is bad because the averred agreement is an attempt to settle by arbitration the right to maintain an action for breach of contract and thus oust the courts of their jurisdiction.
2. In an action for damages for breach of an implied warranty that a certain feeding stuff sold to plaintiff did not contain Rice Hulls, pleas averring that the commodity was sold to the plaintiff under a complete description and specification and that the goods met in every particular the description and specification set forth in the contract of sale set up a good defense.
3. There is no implication of warranty in conflict with the express terms of the agreement.

A writ of error to the Circuit Court for Hillsborough County; F. M. Robles, Judge.

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Judgment reversed.

Mabry & Carlton and *William L. Pencke*, for Plaintiff
in Error;

W. A. Carter and *William N. Taliaferro*, for Defendant
in Error.

ELLIS, J.—The defendant in error as plaintiff below brought an action against Adolph Steinhardt for damages for breach of an implied warranty in the sale of certain feeding stuff called Rice Bran. The first count was the common count for money received by the defendant for use of the plaintiff. The second count alleged that the defendant sold to the plaintiff 285 sacks of rice bran knowing that the plaintiff intended to resell it in the State of Florida, that the plaintiff paid for the same and afterwards it was discovered that the bran contained rice hulls and was under the law of Florida not salable in this State, and the bran was seized by the State and the plaintiff sustained the loss. The third count alleged that the plaintiff was engaged in the business of selling to merchants certain commercial feeding stuffs which the defendant knew, but sold and shipped to the plaintiff certain commercial feeding stuffs alleged to be rice bran; that plaintiff received it and paid for it, but later it was discovered to contain rice hulls, and at the time of the sale the law of Florida prohibited the sale of commercial feeding stuffs containing rice hulls. That it was seized by the State of Florida and was lost to the plaintiff. That the plaintiff was neither an importer, manufacturer or manipulator who mixed commercial feeding stuffs for sale.

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Pleas were filed to the second and third counts and demurrers to them were sustained. Thereupon the parties agreed that the first count to the declaration and the pleas thereto should be withdrawn "and that final judgment be entered by the court for the plaintiff." Judgment was entered for the plaintiff and defendant took a writ of error and assigned as errors two orders sustaining demurrers to the pleas.

The first plea to the second and third counts averred that the parties had agreed to settle by arbitration "any differences" arising from the transaction. Demurrer to this plea was sustained. The plea was bad because "any differences" is a term broad enough to include a difference arising upon the question of right to maintain an action for breach of the contract. Such an agreement is invalid as attempting to oust the courts of their jurisdiction. See *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 South. Rep. 297.

Pleas numbered from three to ten inclusive averred: That the plaintiff purchased a larger amount of the article than that mentioned in the declaration, accepted the full amount, and after full opportunity of inspection sold all of it except that mentioned in the declaration and paid for the entire amount purchased; that the plaintiff knew or could have known by the exercise of due diligence the ingredients of the feed stuff. The fifth plea is substantially the same as the third as to retaining and selling the goods after opportunity for inspection; that the goods were purchased under a complete description and specification, and met in every particular the description and specification named in the contract; that the goods were sold under a complete specification and express warranty which the "goods met in every particular." The eighth

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plea is substantially the same as the third and fifth. The ninth averred that the plaintiff knew or could have known by exercise of due diligence that the feed stuff was composed of a mixture of rice bran and rice hulls. The tenth plea is substantially the same as the ninth.

A demurrer to these pleas was sustained.

The defense presented by the pleas was that the plaintiff had full opportunity to examine the feeding stuff, could have by due diligence ascertained that it contained rice hulls, was notified by his contract with the defendant that it contained rice hulls, but accepted the same, paid for it and sold it in the State in violation of law.

The declaration specifically alleged that the mixture contained "Rice Hulls" which rendered it non-salable in Florida. The sixth and seventh pleas averred that the mixture was sold under a "complete specification and express warranty, which specification and express warranty the goods met in every particular." The sixth plea uses the words "description and specification" in place of the words "specification and express warranty."

The important central fact of the case as made by the declaration was that the mixture contained rice hulls. That one ingredient rendered the mixture unsalable in Florida. The pleas which must be taken to admit the material allegations not denied averred that the mixture was sold to the plaintiff under a "complete description and specification and that the goods met in every particular the description and specification set forth in the contract of sale." The pleas could bear no other construction than that the plaintiff bought the feed stuff with full knowledge that it contained rice hulls. If the plaintiff had such knowledge, bought the feed stuff under such a

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contract, then there was no implied warranty that the material was salable in Florida as a commercial feeding stuff, because the plaintiff was charged with notice of the provisions of Chapter 5661, Laws of 1907, forbidding the sale in Florida of feed stuff containing rice hulls. It needs no argument nor citation of authority to establish the proposition that a dealer in commercial feed stuff cannot in his eagerness for profit deliberately violate the law of his State by undertaking to sell a forbidden article and when caught in the dishonorable business pass the loss on to his vendor under pretense of an implied warranty that the article was salable when he had notice that it was not. He cannot plead ignorance of the law and the pleas averred that he was not ignorant of the fact. See *Richardson-Kellett Co. v. Kline*, 70 Fla. 23, 69 South. Rep. 203, where it was held that a certain reservation in a deed would ordinarily be a breach of a proposed general warranty against encumbrances, but under the facts it was not such an encumbrance as would give the vendee any right to complain. The case as made by the declaration is treated by both parties as if it rests upon an implied warranty which is an inference of law on certain facts, but there will be no implication of warranty in conflict with the express terms of the agreement. If the contract of sale showed the mixture to contain rice hulls, and such must be the construction placed on the pleas because they admit the allegation of the declaration that the mixture did contain rice hulls, and aver that it was sold to plaintiff under a specification of its ingredients, there can be no implication of a warranty of salability, because such implication would be in direct opposition to the provisions of a statute which forbids its sale.

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The declaration alleges that the defendant sold to the plaintiff "rice bran," which it is alleged is a "commercial feeding stuff." This would seem to be an express warranty that the "feeding stuff" contained no "rice hulls." In other words, the sale of the article by the name or description of "rice bran" constituted a warranty that the article was of the designated variety. See 24 R. C. L. p. 174. But the pleas averred that while it was sold as rice bran (impliedly admitted), it in fact was sold under a "specification" or "description" showing the presence of rice hulls (impliedly admitted). If that is true, there was no express warranty in the use of the name "Rice Bran."

Treating the declaration as one upon an express warranty that the article sold was "Rice Bran" and not a mixture of "Rice Bran and Rice Hulls," which latter is of no value as an article of merchandise, while the former is of much value, the issue tendered by other pleas, that the plaintiff had an opportunity to inspect the article and ascertain the fact of the presence of the ingredient rendering it of no value as an article of merchandise in Florida, was immaterial and constituted no defense, as the purchaser had a right to rely upon the express warranty.

The demurrer to the sixth and seventh pleas should have been overruled.

The judgment is therefore reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Keenan et al. v. Slane—Decision of Court.

LEONA KEENAN, BY AND WITH HER HUSBAND, H. A. KEENAN, *Plaintiffs in Error*, v. J. H. SLANE, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF C. T. SLANE, DECEASED, *Defendant in Error*.

Decision Filed October 14, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Columbia; M. F. Horne, Judge.

Cone & Chapman, for Plaintiffs in Error;

Guy Gillen, for Defendant in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the Judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Judgment; it is, therefore, considered, ordered and adjudged by the Court that the said Judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Knight et al. v. Mott et al.—Decision of Court.

D. E. KNIGHT AND BANK OF LAKE BUTLER, A CORPORATION, *Appellants*, v. JAMES R. MOTT, G. C. MOTT, N. C. MOTT, G. T. TETSTONE, W. W. ROBERTS, B. J. ROBERTS, HIRAM HUNTER, M. L. ALLEN, M. A. ALLEN, BOARD OF PUBLIC INSTRUCTION OF BRADFORD COUNTY, FLORIDA, A CORPORATION, *Appellees*.

Decision Filed October 14, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Bradford; James T. Wills, Judge.

J. E. Futch, for Appellants;

A. Z. Adkins, for Appellees.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the Order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Order; it is, therefore, considered, ordered and adjudged by the Court that the said Order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Blackshear v. Bell—Decision of Court.

R. D. BLACKSHEAR, *Plaintiff in Error*, v. H. G. BELL, AS
ADMINISTRATOR OF THE ESTATE OF J. A. B. SIKES, DE-
CEASED, *Defendant in Error*.

Decision Filed October 14, 1920.

A writ of error to a judgment of the Circuit Court
within and for the County of Bay; D. J. Jones, Judge.

W. B. Farley and J. M. Sapp, for Plaintiff in Error;

J. M. Calhoun, for Defendant in Error.

PER CURIAM.—This cause having been heretofore sub-
mitted to the Court upon the transcript of the record of
the judgment aforesaid, and brief and argument of coun-
sel for the respective parties, and the record having been
seen and inspected, and the Court being now advised of
its judgment to be given in the premises, it seems to the
Court that there is no error in the said judgment; it is,
therefore, considered, ordered and adjudged by the Court
that the said judgment of the Circuit Court be, and the
same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR AND WHITFIELD, J. J.,
concur.

ELLIS AND WEST, J. J., dissent.

Blackshear et al. v. Bell—Decision of Court.

R. D. BLACKSHEAR AND W. J. BLACKSHEAR, *Plaintiffs in Error*, v. H. G. BELL, AS ADMINISTRATOR OF THE ESTATE OF J. A. B. SIKES, *Defendant in Error*.

Decision Filed October 14, 1920.

A writ of error to a judgment of the Circuit Court within and for the County of Bay; D. J. Jones, Judge.

W. B. Farley and J. M. Sapp, for Plaintiffs in Error;

J. M. Calhoun, for Defendant in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the judgment aforesaid, and brief and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR AND WHITFIELD, J. J.,
concur.

ELLIS AND WEST, J. J., dissent.

Praire Pebble Phos. Co. v. Silverman—Syllabus.

PRAIRIE PEBBLE PHOSPHATE COMPANY, A CORPORATION,
Plaintiff in Error, v. LOUIS SILVERMAN, TRADING AS
S. ROSIN & COMPANY, *Defendant in Error*.

Opinion Filed October 14, 1920.

1. All contracts are subject to valid governmental regulations, and the organic law forbids a violation of the obligation of contracts that are lawful when made and that are not subject to the fair exercise of sovereign governmental power to conserve the general welfare.
2. Chapter 6914, Acts of 1915, as made applicable to the merchandise order given in payment for labor in this case, is not unconstitutional.
3. The provision of Chapter 6914, Acts of 1915, relating to attorney fees, is not covered by the title of the Act as required by Section 16, Article III of the Constitution, and is, therefore, not effective as law.
4. Where provisions contained in an act violate some requirement of the organic law, or are not a part of, or properly connected with, the subject expressed in the title of the act, and such part so unconstitutionally or so illegally embraced in the Act can be eliminated or disregarded without destroying the effectiveness of the Act for the purpose intended, the illegal part should be so eliminated or disregarded, and the valid portion held to be operative.
5. An elimination of the provision as to attorney fees does not affect the other portions of Chapter 6914, Acts of 1915.
6. A remittitur permitted as stated in the opinion.

A Writ of Error to the Circuit Court for Polk County;
John S. Edwards, Judge.

Praire Pebble Phos. Co. v. Silverman—Opinion of Court.

Judgment affirmed if remittitur be entered; otherwise reversed.

Olliphant & Olliphant and *Wilson & Swearingen*, for Plaintiff in Error;

Wilson & Boswell and *John W. Burton*, for Defendant in Error.

WHITFIELD, J.—This writ of error was taken to a judgment obtained upon orders for the payment in merchandise of stated amounts due for labor, the action being brought pursuant to Chapter 6914, Acts of 1915. The act is as follows:

“AN ACT Making Any Person, Firm or Corporation Liable, on Demand, in Current Money of the United States, to Any Legal Holder Thereof, for the Full Face Value of Any Checks, Coupons, Punch-outs, Tickets, Tokens or Other Device Issued by Them in Payment for Labor, and Redeemable Either Wholly or Partially in Merchandise at Their or Any Other Place of Business, and Fixing the Time After Which Said Checks, Coupons, Punch-outs, Tickets, Tokens or other Device shall become Redeemable in Cash, and Providing for the enforcement of This Act.

“Be It Enacted by the Legislature of the State of Florida:

“Section 1. That any person, firm or corporation issuing checks, coupons, punch-outs, tickets, tokens or other device in payment for labor, redeemable either wholly or partially in goods or merchandise, at their or any other place of business, shall, on demand of any legal holder thereof, on or after the nineteenth day succeeding the day

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of issuance, be liable for the full face value thereof in current money of the United States.

“Sec. 2. That any such checks, punch-outs, coupons, tickets, tokens or other device, issued by any person, firm or corporation in payment for labor shall be considered and treated as payable to bearer in current money of the United States, notwithstanding any contrary stipulation or provision which may be therein contained.

“Sec. 3. That in case of failure of any person, firm or corporation to pay any legal holder of any such check, punch-out, ticket, coupon, token or other device issued by them in payment for labor, the full face value thereof in current money of the United States, on or after the nineteenth day succeeding the day of issuance, when so demanded, such holder may immediately bring suit thereon in any court of competent jurisdiction, and, in addition to recovering the full face value thereof, with legal interest from demand, may recover ten per cent. of said amount as attorney’s fees in the same suit.

“Sec. 4. All laws and parts of laws in conflict herewith are hereby repealed.

“Sec. 5. This Act shall take effect immediately upon its passage and approval by the Governor.

“Approved June 5, 1915.”

One of the orders, which is typical, is as follows:

“Merchandise Order.

No. 2230C

\$3.00

Mulberry, Fla., 8/14 1917.

H. A. Ford, deliver to Dewey Roberts, Three Dollars in merchandise and charge to our account.

Prairie Pebble Phosphate Company.

By C. E. Fitts, Timekeeper.

Endorsed.

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This order was given to me in payment for labor.

Signed: Dewey Roberts."

Both the constitutionality and the applicability of the statute are contested, but no serious difficulty is found in applying the statute to the facts of this case, nor in determining the validity of the main features of the statute against the grounds asserted.

While statutes and all other governmental actions are subject to the limitations imposed by the Constitution, the organic right of "all men" to acquire, possess and protect property is not absolute and unlimited. As the Constitution does not define such rights they may be defined by statute. All property rights are subject to governmental regulation "for the protection, security and benefit of the citizens" in order to secure the "blessings" of "constitutional liberty," as expressed in the Constitution. Therefore, organic property rights relate to those that are recognized by the law, and such rights are subject to sovereign governmental regulation within the limitations prescribed by definite provisions of the Constitution. Likewise all contracts are subject to valid governmental regulations and the organic law forbids a violation of the obligation of contracts that are lawful when made and that are not subject to the fair exercise of sovereign governmental power to conserve the general welfare. *Manigault v. Springs*, 199 U. S. 473, 26 Sup. Ct. Rep. 127; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. Rep. 529; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. Rep. 265; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, text 567, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. City of Goldsboro, North Carolina*, 232 U. S. 548, text 558, 34 Sup. Ct. Rep. 364; *Union Dry Goods Co. v. Georgia Public Service*

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Corporation, 248 U. S. 372, 39 Sup. Ct. Rep. 117; 111 Atl. Rep. 209. The statute is not so arbitrary and oppressive as to violate organic property rights.

The statute here involved was enacted prior to the date of the orders, and the orders were issued subject to the valid provisions of all applicable statutes. *State ex rel. Ellis v. Tampa Water Works Co.*, 56 Fla. 858, 47 South. Rep. 358; *McCaskill v. Union Naval Stores Co.*, 59 Fla. 571, 52 South. Rep. 961.

But the provision for compulsory attorney fees is clearly not covered by the title of the Act as required by organic law. Art. III, Sec. 16, Const.; in re Advisory Opinion to Governor, 14 Fla. 285; *Carr v. Thomas*, 18 Fla. 736; *Savannah, F. & W. Ry. Co. v. Geiger*, 21 Fla. 669; *State ex rel. Gonzales v. Palmes*, 23 Fla. 620, 3 South. Rep. 171; *State ex rel. Attorney General v. Burns*, 38 Fla. 367, 21 South. Rep. 290; *Wade v. Atlantic Lumber Co.*, 51 Fla. 628, 41 South. Rep. 72; *ex parte Knight*, 52 Fla. 144, 41 South. Rep. 786; *Peters v. Gilchrist*, 222 U. S. 483, 32 Sup. Ct. Rep. 122.

Where provisions contained in an Act violate some requirement of the organic law, or are not a part of, or properly connected with, the subject expressed in the title of the Act, and such part so unconstitutionally or so illegally embraced in the Act can be eliminated or disregarded without destroying the effectiveness of the Act for the purpose intended, the illegal part should be so eliminated or disregarded, and the valid portion held to be operative. *Hayes v. Walker*, 54 Fla. 163, 44 South. Rep. 747.

An elimination of the provision as to attorney fees does not affect the other portions of the Act. *State ex*

Pipkin v. Carter—Decision of Court.

rel. Gonzalez v. Palmes, *supra*; *Harper v. Galloway*, 58 Fla. 255, 51 South. Rep. 226; *Board of Com'rs of Hillsborough County v. Savage*, 63 Fla. 337, 58 South. Rep. 835; *State ex rel. Clarkson v. Phillips*, 70 Fla. 340, 70 South. Rep. 367; *City of Tampa v. Salmonson*, 35 Fla. 446, 17 South. Rep. 581; *State ex rel. Ellis v. Tampa Water Works Co.*, 56 Fla. 858, 47 South. Rep. 358.

A separate amount awarded in the verdict as attorney fees and included in the judgment is manifest error. Therefore, the judgment of the court below will be affirmed in the event the plaintiff in the court below shall within fifteen days from the date when the mandate of this court in the case is filed in the court below, enter a remittitur of all sums allowed as attorney fees, such remittitur to be effective from the date of the rendition of the judgment in the court below, otherwise the said judgment will be reversed. The cost of the writ of error proceedings to this court are hereby adjudged against the defendant in error.

BROWNE, C. J., AND TAYLOR AND WEST, J. J., concur.

ELLIS, J., dissents.

L. N. PIPKIN, *Appellant*, v. E. M. CARTER, *Appellee*.

Decision Filed October 15, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Polk; John S. Edwards, Judge.

Wilson & Sircaringen, for Appellant;

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Olliphant & Olliphant, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

PERRY STEDMAN, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed October 15, 1920.

1. The effect of Chapter 6483, Acts of 1913, Laws of Florida, Section 3569, Florida Compiled Laws, 1914, is to make the act of unlawful desertion by a husband and father of his wife and child or children, or by a husband of his wife or by a father of his child or children a crime. The same is true with respect to withholding from them or any one or more of them the means of support. If he unlawfully withholds from them or any one or more of them the means of support his act is a crime. The unlawful desertion by him of any one or more of them, or the unlawful withholding by him of the means of support from any one or more of them, renders him amenable to the penalties prescribed by the statute, the only difference being that as to the wife his liability under the statute is contingent upon the non-existence of such cause or causes for his act or acts as may be recognized as ground or grounds for divorce.

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2. While either the unlawful desertion or the unlawful withholding the means of support by a husband from his wife may be a distinct act from the desertion or withholding of the means of support by a father from his child or children, and each or either of such acts may be indictable and punishable as separate offenses under the statute, yet when such desertion or withholding of means of support from the wife and child or children is by the same person at the same time, such conduct may, under the statute, be regarded as constituting one offense. Where this is the case there can be no valid objection to an indictment charging the commission of such offense in a single count only and a verdict on such indictment finding defendant guilty as to less than the whole number named in the indictment will not operate as an acquittal generally of the defendant.
3. When a statute makes either of two or more distinct acts, connected with the same general offense, and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offense.
4. It is settled by the great weight of authority that where an information or indictment is complained of on the ground of duplicity the defendant must make the assault thereon by demurrer or by motion to quash before verdict rendered, and that he can not assail it for duplicity by a motion in arrest of judgment. If he delays until after verdict rendered to raise the issue of duplicity in the indictment he will be held to have waived such issue.
5. At common law abandonment by or neglect of a husband to support his wife was not a criminal offense. Statutes, therefore, making such acts indictable and punishable as a crime must be strictly construed.
6. Withholding the means of support means something more than failure to support or non-support. It presupposes the existence or the ability to obtain the means of support by the accused and need by the alleged dependent or dependents from whom support is withheld. That which has no exist-

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ence, actual or potential, cannot be withheld; neither can that be withheld which is already possessed.

7. Statutes such as that under consideration are not substitutes for statutes affording civil remedies in such cases.
8. A verdict must be responsive to the charge and find everything that is necessary to enable the court to render judgment.
9. Under an indictment for "withholding the means of support" from wife and child by a husband and father, a verdict of "guilty of non-support of the child" is insufficient as not responsive to the indictment.

A writ of error to the Circuit Court for Alachua County; James T. Wills, Judge.

Judgment reversed.

W. S. Broome, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WEST, J.—Plaintiff in error, referred to herein as defendant, was charged in an indictment with unlawfully deserting his wife, Mandy Stedman, and unlawfully withholding from his said wife and his minor child, Lillie Mae Stedman, the means of support, there not then and there existing such cause or causes as are recognized as ground or grounds for divorce:

The indictment is in two counts. The desertion of the wife is charged in the first count, and the withholding of means of support from both the wife and child is charged in the second count.

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Upon a trial of the case the following verdict was returned: "We, the jury, find the defendant guilty of non-support of the child. So say we all. F. M. Wilson, Foreman."

There was a motion for "a verdict finding the defendant not guilty notwithstanding the verdict of the jury finding the defendant guilty," a motion in arrest of judgment and a motion for a new trial, all of which were denied.

Sentence was imposed and from this judgment defendant took writ of error.

By the several motions enumerated it is urged that the effect of the verdict was to acquit the defendant of the offense charged in the first count of the indictment, namely, the desertion of the wife. This, of course, is true. But it is further contended that conviction of the defendant under the second count as to the child only and the acquittal as to the wife operate as an acquittal of the defendant generally under this count, his theory being that inasmuch as he is charged with withholding the means of support from his wife and child there must be a conviction as to both or an acquittal as to both, and that an acquittal as to one amounts in law as to an acquittal generally.

The statute upon which the prosecution is based is Chapter 6483, Acts of 1913, Laws of Florida, Florida Compiled Laws Sec. 3569. The portion of this statute pertinent here is as follows: "Any man who shall in this State desert his wife and children, or either of them, or his wife where there are no children or child, or who shall withhold from them or either of them, the means of support. Or any mother, when required by law to care for and support her child or children, who shall desert such

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child or children, or who shall withhold from them, the means of support, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment * * * Provided, however, that no husband shall be prosecuted under this Section for the desertion of his wife, or for withholding from his wife the means of support, where there is existing, at the time of desertion, such cause or causes as are recognized as ground or grounds for divorce, by Statute, in this State."

The statute further provides that one who shall be charged with its violation may, either before or after conviction, be released from custody or further punishment upon the entering by such person into a good and sufficient bond conditioned that he or she, as the case may be, will provide the wife and child or children, or the wife when there is no child, or the child or children, with necessary and proper home, food, clothing and care, or will pay to some proper person or institution for the use of such dependent or dependents such sum, at stated periods, as the court may deem just for her, its or their proper maintenance and support.

The effect of this statute, in so far as is applicable to the facts of this case, is to make the act of unlawful desertion by a husband and father of his wife and child or children, or by a husband of his wife, or by a father of his child or children, a crime. The same is true with respect to withholding from them, or any one or more of them, the means of support. If he unlawfully withholds from them, or any one or more of them, the means of support, his act is a crime. The unlawful desertion by him of any one or more of them, or the unlawful withholding by him of the means of support from any one or more of them, renders him amenable to the penalties pre-

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scribed by the statute, the only difference being that as to the wife his liability under the statute is contingent upon the non-existence of such cause or causes for his act or acts as may be recognized as ground or grounds for divorce.

So understood, while either the unlawful desertion or the unlawful withholding the means of support by a husband from his wife may be a distinct act from the desertion or withholding of the means of support by a father from his child or children, and each or either of such acts may be indictable and punishable as separate offenses under the statute, yet when such desertion or withholding of means of support from the wife and child or children is by the same person at the same time, such conduct may, under the statute, be regarded as constituting one offense. Where this is the case there can be no valid objection to an indictment charging the commission of such offense in a single count only and a verdict on such indictment finding defendant guilty as to less than the whole number named in the indictment will not operate as an acquittal generally of the defendant. 14 R. C. L. 194; *Bradley v. State*, 20 Fla. 738; *Irvin v. State*, 52 Fla. 51, 41 South. Rep. 785; *State v. Sutcliffe*, 18 R. I. 53, 25 Atl. Rep. 654; *Goddard v. State*, 73 Neb. 739, 103 N. W. Rep. 443; *Schulze v. State* (Tex.), 56 S. W. Rep. 918; *State v. Sherman*, 81 Kan. 874, 107 Pac. Rep. 33; *State v. Schweiter*, 27 Kan. 499; *Laroe v. State*, 30 Tex. App. Rep. 374; 17 S. W. Rep. 934; *People v. Frank*, 28 Cal. 507; *Hayworth v. State*, 14 Ind. 590. *Sprouse v. Commonwealth*, 81 Va. 374; *People v. Johnson*, 81 Mich. 573, 45 N. W. Rep. 1119; *Kilrow v. Commonwealth*, 89 Pa. St. Rep. 480.

Furthermore, if it should be held that the count in the indictment upon which defendant was convicted is sub-

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ject to the objection made to it upon the ground of duplicity, it was the duty of defendant to raise the question before the trial of the case, failing in which it will be held to have been waived by him. In *Irvin v. State, supra*, where a similar question was presented and considered, this court said: "It is settled by the great weight of authority that where an information or indictment is complained of on the ground of duplicity the defendant must make the assault thereon by demurrer or by motion to quash before verdict rendered, and that he can not assail it for duplicity by a motion in arrest of judgment. If he delays until after verdict rendered to raise the issue of duplicity in the indictment he will be held to have waived such issue."

The verdict of the jury is defective in that it is not responsive to the charge against defendant, and for that reason the judgment must be reversed. *Harris v. State*, 53 Fla. 37, 43 South. Rep. 311; *Renfroe v. State*, 76 Fla. 392, 80 South. Rep. 183. At common law abandonment by or neglect of a husband to support his wife was not a criminal offense. 21 Cyc. 1611. The statutes therefore making such acts indictable and punishable as a crime must be strictly construed. "Withholding" the means of support means something more than failure to support or "non-support." It presupposes the existence or the ability to obtain the "means of support" by the accused and need by the alleged dependent or dependents from whom support is withheld. That which has no existence, actual or potential, cannot be withheld; neither can that be withheld which is already possessed. The object generally of such statutes is to prevent the alleged dependents from becoming public charges. Statutes of this kind are not substitutes for statutes affording civil remedies in such cases. 21 Cyc. 1611; *People ex rel. Demos v. De-*

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mos, 100 N. Y. Sup. 968, 115 App. Div. 410; People ex rel. Feeney v. Dershem, 79 N. Y. Sup. 612, 78 App. Div. 626; People v. Turner, 29 Cal. App. 193, 156 Pac. Rep. 381; State v. Thornton, 232 Mo. 298, 134 S. W. Rep. 519; Dalton v. State, 118 Ga. 196, 44 S. E. Rep. 977; Richie v. Commonwealth, 23 Ky. Law Rep. 1237, 64 S. W. Rep. 979.

We, of course, are not dealing with the question of the moral obligations of a husband and father, but only with the design and effect of the statute under which the prosecution in this case is brought.

For the defect in the verdict the judgment is reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
CONCUR.

MICHAEL LICATA, *Plaintiff in Error*, v. THE STATE OF
FLORIDA, *Defendant in Error*.

Opinion Filed October 18, 1920.

1. The Supreme Court has no appellate jurisdiction in cases of conviction of misdemeanor in the Criminal Courts of Record.
2. Where the record shows a want of appellate jurisdiction in this court, the writ of error will be dismissed *sua sponte*.
3. The conviction in this case being in a Criminal Court of Record and for a misdemeanor, the Supreme Court has no jurisdiction to review the judgment on writ of error, therefore the writ of error taken herein is dismissed.

A Writ of Error to the Criminal Court of Record,
Hillsborough County; W. S. Graham, Judge.

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Writ of Error dismissed.

Dickenson & Dickenson, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WHITFIELD, J.—In the Criminal Court of Record for Hillsborough County, Licata was convicted and sentenced to pay a fine of \$500.00, or imprisonment in the county jail for sixty days, upon an information charging that on March 29, 1920, in Hillsborough County, Florida, he “did unlawfully have in his possession and under his control and custody in a house located and known as number sixteen hundred and two, Seventeenth Street, in the City of Tampa, in said County and State, two hundred quarts of intoxicating liquors,” contrary to the statute. Chapter 7736, Laws of Florida, makes it unlawful for any person “to possess, have in custody or control” * * * exceeding “four quarts of distilled alcoholic or intoxicating liquors,” etc., and provides punishment for a violation of the statute as a misdemeanor “by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months.”

“The term felony, whenever it may occur in this Constitution or in the laws of the State, shall be construed to mean any criminal offense punishable with death or imprisonment in the State penitentiary.” Sec. 25, Art. XVI, Const.

“The Circuit Courts * * * shall have final appellate jurisdiction * * * of all misdemeanors tried in criminal courts.” Sec. 11, Art. V.

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"The Supreme Court shall have appellate jurisdiction in all * * * cases of conviction of felony in the criminal courts." Sec. 5, Art. V.

"Any crime punishable by death, or imprisonment in the State prison, is a felony, and no other crime shall be so considered. Every other offense is a misdemeanor." Sec. 2352, Rev. Stats. 1892, Sec. 3176 Gen. Stats. 1906.

The term felony whenever it occurs in the Constitution or laws of this State means any criminal offense punishable with death or imprisonment in the State penitentiary.

This court has not appellate jurisdiction in cases of conviction of misdemeanor in the Criminal Courts of Record.

Where the record shows a want of appellate jurisdiction in this court, the writ of error will be dismissed sua sponte. *Walden v. State*, 50 Fla. 151, 39 South. Rep. 151; *Sutton v. State*, 13 Fla. 670.

Counsel for plaintiff in error filed a brief on the merits of the case and the Attorney General for the State files a brief in which he "moves the court to dismiss the writ of error herein for want of jurisdiction."

In the cases of *ex parte Francis*, 76 Fla. 304, 79 South. Rep. 753; *Marasso v. Van Pelt*, 77 Fla. 432, 81 South. Rep. 529; and *Neisel v. Moran*, 80 Fla., 84 South. Rep. 346, the review here was on habeas corpus.

As it is clear that under the Constitution the Supreme Court has no appellate jurisdiction in cases of misdemeanors tried in the Criminal Courts, and that the Circuit Courts have final appellate jurisdiction in such cases so tried, the writ of error taken to this court to the

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judgment of conviction of a misdemeanor so charged and tried in the Criminal Court of Record is dismissed for want of jurisdiction.

It is so ordered.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

ROY W. JACKSON AND PEARL H. JACKSON, HIS WIFE, *Appellants*, v. JOHN D. JACKSON, *Appellee*.

Opinion Filed October 18, 1920.

1. An appeal in chancery from a final decree opens for consideration by the appellate court the merits of the cause.
2. The rulings of the chancellor who tried the cause are presumed upon appeal to be correct and the burden is upon the appellant to make it clearly to appear that such rulings are erroneous, or the decree will be affirmed.
3. A resulting trust in real property arises where an agent invests his principal's money in such property with the latter's consent, but takes the title thereto in the agent's name, and the fact that the agent applies the particular money furnished to him for the purchase to his own use, but later substitutes therefor funds of his own, does not alter the rule.
4. Where a married woman contributed money toward the purchase of real property by her husband who had accepted from his father a sum of money and a commission to purchase a lot for him, but of which trust she had no knowledge, and the purchase of the real property by the son was in the execution of the commission entrusted to him by his

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father, but the price paid for the property was greater than the sum of money which the father gave to his son for that purpose by the amount contributed by the wife, the latter has a prior lien upon the property purchased to secure the repayment to her of her contribution.

An Appeal from the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Decree modified.

Samuel T. Fletcher, for Appellants;

Hilton S. Hampton, for Appellee.

ELLIS, J.—John D. Jackson exhibited his bill in chancery against his son, Roy W. Jackson, and the latter's wife, alleging in substance that the complainant in 1908 gave his son six hundred and fifty dollars with instructions to buy for the complainant certain lots in Hillsborough County which he wished to occupy for his home. That the son purchased the property designated, but took the title in his own name. The complainant moved upon the lots taking possession of them as his own and has continued in possession ever since. That recently complainant discovered that the title had been taken in his son's name and immediately demanded from him a conveyance, which was refused; the son thereupon executed to his wife Pearl a deed of conveyance for the alleged consideration of one dollar. The prayer is that a trust be declared in the property for the complainant's benefit, that the defendants be required to convey the land to complainant, and for general relief.

The defendants answered denying the material allega-

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tions of the bill, *viz*, that the complainant gave the defendant in 1908 or at any other time the sum of six hundred and fifty dollars, or any sum with which to buy the property. The answer avers that the *defendant* has lived upon the property on the defendants' bounty and has therefore never held it adversely claiming it as his own. The cause was referred to a master to take testimony and transmit it to the court.

Testimony was taken, and upon final hearing the court decreed that the equities were with the complainant and granted the relief sought. From that decree the defendants appealed.

The errors assigned are as follows: The court erred in finding that the property was purchased with funds supplied by the complainant; in finding that the complainant is the owner of the property; in finding the equities to be with complainant; in finding that the defendant, Pearl Jackson, took the title with knowledge of the complainant's rights; and in rendering the decree granting relief.

As an appeal in a chancery cause opens the entire case for consideration by the appellate court, it would seem that one assignment of error in this case at least would have been sufficient to present the whole merits of the cause, because the appeal is from the final decree, and this court by a very long line of decisions has held that an appeal in chancery from a final decree brings up the whole merits of the cause.

In the case at bar, however, no question is argued except the sufficiency of the evidence to justify the decree. Several phases of the evidence are discussed: Whether the complainant gave the money to his son for the pur-

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pose alleged, whether the money was used in the purchase of the property, the character of the complainant's possession of the lots, the defendants' claim for credits on account of money given to his father and the wife's knowledge of the complainant's rights.

There is ample evidence to show that the defendant, Roy Jackson, purchased the property described upon a request by the complainant, his father, to buy "a home" for the latter, that the money was supplied by the complainant, his son, Charlie, and an uncle of the defendant. A large part of the money was in the defendant's hands for several years before the property was bought, he finally did buy the property for his father and took the title in his own name. That the complainant went into possession and he and his wife lived thereon as their home; that the defendant claimed no title to the lots, and although he acknowledged taking title in his own name, said to his father and mother that he would divide the property between the heirs upon the death of complainant and his wife. The defendant testified that an amount of money, \$425.00, was given to him by his father to be used if the defendant wished in business for himself, and that it was delivered to him in a bank in Tampa by his brother-in-law, Mr. Stone; that he used the money to go in business and failed, but he has returned it all in small payments to his father. that payments were made by him to his father in amounts of ten dollars monthly for many years; that the money which he used to buy the place in litigation he saved from his salary and obtained from his wife who had earned the part she contributed teaching school; that he paid \$800.00 for the place, including interest on deferred payments; that his wife worked at other occupations, saved her money and contributed about one-half toward the purchase price of the property. The

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defendant testified that he bought the place that his father and mother might have a home for their lives, but that the money used was his own and his wife's. The defendant has paid the taxes upon the property and the complainant has paid no rent. In January, 1917, the conveyance was made by the defendant to his wife. Mr. Stone was called and testified that he did not pay the money to defendant in the bank; that the money was in his possession for John D. Jackson and he paid it to the latter in Stone's house in St. Petersburg. With evidence as conflicting and contradictory as that appearing in the record in this case it is impossible to say that the conclusion reached by the chancellor is clearly erroneous. He held that the equities were with the complainant; in doing so he concluded that the evidence offered in behalf of the complainant was more worthy of belief than that offered by the defendants.

The presumption is in favor of the correctness of the trial court's ruling, and unless the appellants make it clearly to appear from the record that the ruling was erroneous the decree should be affirmed. See *Magbee v. Kennedy*, 26 Fla. 158, 7 South. Rep. 529; *Mock v. Thompson*, 58 Fla. 477, 50 South. Rep. 673; *Carr v. Lesley*, 73 Fla. 233, 74 South. Rep. 207; *Shad v. Smith*, 74 Fla. 324, 76 South. Rep. 897; *Johns v. Bowden*, 72 Fla. 530, 73 South. Rep. 603; *Williams v. Bailey*, 69 Fla. 225, 67 South. Rep. 877.

The contribution of money by Mrs. Pearl Jackson, which, according to her testimony, amounted to three hundred and eighty-seven dollars toward the purchase price of the lots, presents the only difficulty in the case. The testimony as to the contributions by her toward the purchase price of the lots is corroborated by her husband

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and undisputed by any one. Her purpose seems to have been to assist her husband in purchasing a place for the latter's father and mother without knowledge that her husband held funds of his father with which to buy the property. She seems to have invested her money in it with a view of enabling her husband to acquire it, although being willing for her husband's parents to occupy it during their lives. We think she has an equity in the lots to the extent of the money furnished by her.

An agent who invests his principal's money in real estate with the latter's knowledge, but takes the title in himself without the consent of his principal, a resulting trust in favor of the principal will arise. The fact that he applies the particular money furnished him for the purchase to his own use and substitutes therefor funds of his own, does not alter the rule. See 26 R. C. L. 1228-1229.

The complainant's possession of the property was sufficient notice to Mrs. Pearl Jackson of the nature and character of the claim or title by which he held. See *Tate v. Pensacola, Gulf, Land & Development Co.*, 37 Fla. 439, 20 South. Rep. 542; *Massey v. Hubbard*, 18 Fla. 688. See also 13 L. R. A. (N. S.) 56, Note.

It is ordered that the decree be, and the same is hereby, modified to secure to Mrs. Pearl Jackson a prior lien upon the lots, after conveyance by her and her husband to the complainant, to secure the payment to her of the principal sum of three hundred and eighty-seven dollars.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Wood v. Whittaker—Decision of Court.

M. R. WOOD, *Plaintiff in Error*, v. H. WHITTAKER, SHERIFF
OF ESCAMBIA COUNTY, FLORIDA, *Defendant in Error*.

Decision Filed October 18, 1920.

A writ of error to a judgment of the Court of Record in and for the County of Escambia; C. Moreno Jones, Judge.

Philip D. Beall, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for Defendant in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon a transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Court of Record be, and the same is hereby, affirmed.

All concur.

Schultz et al. v. State ex rel. Swearingen—Syllabus.

F. WILLIAM SCHULTZ, L. B. HATCH, M. C. BURTON, LEWIS COMBS, J. W. HARVEY, AND JAMES G. CAMPBELL, *Plaintiffs in Error*, v. THE STATE OF FLORIDA, EX REL. VAN C. SWEARINGEN, ATTORNEY GENERAL, *Defendant in Error*.

Opinion Filed October 18, 1920.

1. The Legislature has power by a curative act to remedy defects of procedure in the organization of a municipal corporation created, or attempted to be created, under the provisions of Sec. 999 et sequi, Gen. Stats. 1906, if the omission, or provision of the statute violated, could have been originally dispensed with.
2. The adjudication by a court that a municipal corporation has no legal existence because of the ineligibility as incorporators of certain persons participating in the proceedings to create such corporation does not defeat the right of the Legislature by subsequent curative act to remedy the defect.

A Writ of Error to the Circuit Court for Manatee County; O. K. Reaves, Judge.

Judgment reversed.

John B. Singeltary and *Cary B. Fish*, for Plaintiffs in Error.

John F. Burket, for Defendant in Error.

WEST, J.—An information in the nature of a quo warranto was filed in the name of the Attorney General to test the validity of the organization of the village of Sarasota Heights in Manatee County as a municipal corporation.

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Demurrer to the information was overruled. Pleas setting up the facts upon which respondent relied as authority for the exercise of the functions of a municipality were filed and the case was submitted on the merits upon an agreed statement of facts.

There was a finding that the pretended municipality of Sarasota Heights had not been legally organized and had no legal existence and judgment was rendered ousting such pretended municipality from the exercise of the functions and powers of a municipality.

Writ of error was taken from this court and an order of supersedeas was thereupon entered by the trial court.

Subsequently Chapter 8345, Acts of 1919, Laws of Florida, was passed, enacting that the incorporation of the municipality of Sarasota Heights be validated and legalized, and the ordinances enacted by the town council of such municipality and all acts done by its officers were ratified and validated.

The alleged defects in the organization havnig been corrected by this curative act and the municipality having in all respects been made valid, the judgment is reversed for appropriate action in the court below upon the authority of *Givens v. County of Hillsborough et al*, 46 Fla. 502, 35 South. Rep. 88; *Craner v. Comm'rs Volusia County et al*, 54 Fla. 526, 45 South. Rep. 455; *Charlotte Harbor & N. Ry. Co. v. Welles et al.*, 78 Fla. 227, 82 South. Rep. 770; *Board Comm'rs. v. Forbes Pioneer Boat Line*, 80 Fla., 86 South. Rep. 199.

Reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Bacon v. Feigel et al.—Syllabus.

ROBERT A. BACON, FOR THE USE AND BENEFIT OF R. A. MILLS, *Plaintiff in Error*, v. LILLIE E. FEIGEL, JOINED BY HER HUSBAND, REMY A. FEIGEL, *Defendants in Error*.

Opinion Filed October 19, 1920.

1. While a deed of conveyance of land may be properly executed by the grantor when the initials only of his given name are used, yet when the first name of a grantee is given in full in a conveyance and the residence of such grantee is specifically given, a conveyance of the land by such grantee who executed his deed by using the initials only of his given names and by giving in the deed his residence as being in a State other than the one of which he was a resident when the land was conveyed to him, and in a trial of title, proof of the identity of the person whose name and residence are differently given in the chain of title, is demanded, such proof of identity by some substantial evidence may be required upon appropriate and timely objections to muniments of title showing these differences.
2. Under Section 1489, General Statutes of 1906, the court may upon appropriate proceedings taken in the trial of a cause "where it may deem it right for the purposes of justice, order an adjournment for such time, and subject to such terms and conditions, as to costs and otherwise, as it may see fit."

A Writ of Error to the Circuit Court for DeSoto County; George W. Whitehurst, Judge.

Judgment affirmed.

Leitner & Leitner, for Plaintiff in Error;

W. D. Bell, for Defendants in Error.

WHITFIELD, J.—In an action of ejectment a judgment

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rendered on a directed verdict for the defendant was reversed. *Bacon v. Feigel*, 76 Fla. 581, 80 South. Rep. 518.

At a subsequent trial the real plaintiff, R. A. Mills, offered in evidence a deed of conveyance dated March 8, 1886, conveying the land described in the declaration, executed by Elam B. Carlton to "Robert A. Bacon, of Orange County, and State of Florida." This deed was admitted. The real plaintiff, R. A. Mills, then tendered an original quit-claim deed of the land to himself, dated November 11, 1913, from "R. A. Bacon, unmarried, of the County of Travis, and State of Texas." The acknowledgment of this deed was taken by a Notary Public in the State of Indiana. "To the offering of the said original deed the defendant did then and there by counsel object, unless and until some proof be offered of identity of the alleged grantor, R. A. Bacon, of Travis County, Texas, with Robert A. Bacon, of Orange County, Florida, in whom title then rested, for the following reasons, to-wit:

"1. Because the plaintiff has not shown sufficient title to admit this deed in evidence.

"2. Because it does not appear that R. A. Bacon, of Travers County, Texas, the grantor in the offered deed, is the same person as Robert A. Bacon, of Orange County, Florida, the grantee in the deed from Elam B. Carlton to Robert A. Bacon.

"3. Because R. A. Bacon, of Travers County, Texas, will not be presumed to be the identical person as Robert A. Bacon, of Orange County, Florida, until some proof be given of identity.

"Whereupon the judge of the said court upon the consideration of the said motion to exclude the said proffered deed, did then and there state that the same was not a

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presumption of law, that R. A. Bacon, of Travers County, Texas, was the same person as Robert A. Bacon, of Orange County, Florida, and did then and there by his ruling exclude the said deed from the consideration of the said jury, to which ruling the plaintiff did then and there except.

“Thereupon the plaintiff did state in open court that the said deed so offered, and excluded, was the basis of his title; that he had no evidence of identity of R. A. Bacon with Robert A. Bacon and without the admission of the deed in evidence he could not recover.

“Thereupon the court did rule that the plaintiff was not entitled to maintain his suit, and directed the jury to bring in a verdict for the defendant, to which ruling the plaintiff did then and there by counsel except.”

While a deed of conveyance of land may be properly executed by the grantor when the initials only of his given name are used, yet when the first name of a grantee is given in full in a conveyance and the residence of such grantee is specifically given, a conveyance of the land by such grantee who executed his deed by using the initials only of his given names and by giving in the deed his residence as being in a State other than the one of which he was a resident when the land was conveyed to him, and in a trial of title, proof of the identity of the person whose name and residence are differently given in the chain of title, is demanded, it may be required upon appropriate and timely objections to muniments of title showing these differences. See Jones on Law of Real Property and Conveyancing, §218; *Huston v. Graves*, — Mo. —, 213 S. W. Rep. 77, 5 A. L. R. 423. In such cases at least some substantial evidence as to identity should be adduced. In this case the plaintiff brought

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his action in the name of "Robert A. Bacon, for the use and benefit of R. A. Mills." The real plaintiff, R. A. Mills, testified that he "bought the property in 1913 from R. A. Bacon," and that he got his "deed from R. A. Bacon through F. M. Hendry." When the stated objections were made to the introduction in evidence of the deed showing the difference in the name and in the residence of the grantee in one deed and the grantor in the succeeding deed, the plaintiff "thereupon did state in open court that he had no evidence of identity of R. A. Bacon with Robert A. Bacon." The plaintiff, Mills, acquired the deed and should have produced upon demand at least some evidence of the identity thus challenged; and if the challenge was a surprise that could not reasonably have been anticipated, the court, upon proper application and showing, could have made an appropriate order, under the statute which provides that the court may "where it may deem it right for the purposes of justice, order an adjournment for such time, and subject to such terms and conditions, as to costs and otherwise, as it may see fit." §1489, Gen. Stats., 1906. *Ropes v. Florida Fish & Produce Co.*, 64 Fla. 444, 60 South. Rep. 179.

In this case no application was made for an appropriate adjournment to enable the plaintiff to present evidence; and counsel specifically stated to the court "that he had no evidence of identity of R. A. Bacon with Robert A. Bacon."

Under the circumstances the court did not err in excluding the proffered deed, and in directing a verdict for the defendant.

Judgment affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

Newcomb et al. v. Belton—Syllabus.

DAVID B. NEWCOMB AND MARY E. NEWCOMB, *Plaintiffs in Error*, v. D. L. BELTON, *Defendant in Error*.

Opinion Filed October 19, 1920.

1. Under the plea of the general issue in debt upon simple contract, express or implied, the burden is upon the plaintiff to prove every material fact which is alleged in his declaration.
2. Where a verdict is wholly unsupported by the evidence, it is the duty of the trial court to set it aside upon motion.

A Writ of Error to the Circuit Court for Sumter County; W. S. Bullock, Judge.

Judgment reversed.

Gaines & Futch, for Plaintiffs in Error;

Glenn Terrell, for Defendant in Error.

ELLIS, J.—D. L. Belton brought an action against David B. Newcomb and Mary E. Newcomb. The declaration defectively declares upon counts for "labor and services" rendered for the defendants by the plaintiff, for work and materials, money paid and for "money requested by defendants for the use of the plaintiff." The bill of particulars showed that the demand was for "services in looking after and protecting lands and timber of Mary E. Newcomb and David B. Newcomb from July 19th, 1917, to January, 1919, at \$100.00 per year, \$140.00."

The defendants pleaded the general issue to the common counts. There was a verdict for the plaintiff in the

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sum of \$177.77. The court ordered a remittitur of \$33.57 and entered judgment for \$144.20, and the defendants took a writ of error.

The errors assigned are that the court erred in denying defendants' motion to set aside the verdict and award a new trial, and in entering judgment for the plaintiff.

The motion for a new trial consists of four grounds, three of which are in effect that the verdict is not supported by the evidence, and the fourth that the jury acted through passion or prejudice and were improperly influenced by considerations outside the evidence.

There was no evidence whatsoever offered by the plaintiff to support the declaration. There was no evidence of money paid by the plaintiff for the use of the defendants, nor of materials furnished. The last count in the declaration, which is for "money requested by the defendants for the use of the plaintiff," states no conceivable claim against the defendants. Assuming that the first count, which is for "labor done and services rendered," and the second count for "work done and materials furnished," correctly states a cause of action (See Sec. 1450, General Statutes, 1906), the evidence is wholly lacking to support them. The plaintiff testified that he was "employed by the defendants through Mary E. Newcomb to look after their lands in Sumter County and pay the taxes on same." That the only contract he had with the defendants is "contained in the letters between us." This with the letters constituted the evidence in his behalf, except that he testified that he showed the property to several people and notified Mary E. Newcomb that certain parts of their timber had been cut. The letters contain no offer or promise from the defendants to employ the plaintiff. The letter of July 19, 1917,

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from Mary E. Newcomb stated that Mr. Budd had informed them that the plaintiff "looked after the timber for us," and that they would be pleased to have him do so again, and requested him to state upon what terms he would do it. The defendants offered in evidence a letter of the plaintiff dated July 24, 1917, in which the plaintiff stated that in reply to the defendants' letter of recent date he could "make an estimate of (your) their timber in the next thirty days and see that the taxes are properly assessed and see that no one trespasses on (your) their land for the next year for \$100.00."

There was no acceptance of this proposition so far as the evidence discloses. The plaintiff himself testified that he was employed to look after the lands and pay the taxes, but there was no evidence of any employment, of any contract or agreement between the parties. If the plaintiff was relying upon an agreement to pay him a certain compensation for a certain service he failed to prove his case. If he relied upon a *quantum meruit* he failed because there was no evidence that he performed any service, nor was there any evidence of the value of what he claimed to have done.

Under the plea of the general issue in debt upon a simple contract, express or implied, the plaintiff has the burden of proving every material fact which is alleged in his declaration. See 1 Archbold's *Nisi Prius*, 303.

In this case the plaintiff should have proved the contract and his performance of it if he relied upon a simple contract, or the work done at defendants' request and value of it if he relied upon an implied contract; he did neither; so the verdict was not supported by the evidence.

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The motion for a new trial should have been granted. The court erred in denying the motion.

The judgment is reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J.J.,
CONCUR.

C. M. WHITE, *Appellant*, v. M. L. DEKLE AND FITZHUGH
LONG, *Appellees*.

Decision Filed October 19, 1920.

An Appeal from a Decree of the Circuit Court within
and for the County of Jackson; C. L. Wilson, Judge.

J. M. Calhoun and *E. C. Welch*, for Appellant;

Paul Carter, for Appellees.

PER CURIAM.—This cause having heretofore been submitted to the court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Read et al. v. Leitner et al.—Syllabus.

P. R. READ *et al.*, Appellants, v. W. E. LEITNER *et al.*, Appellees.

Opinion Filed October 19, 1920.

Petition for Rehearing Denied November 12, 1920.

Where the head of a family residing in this State lives with his family as their home on premises owned by him, and for purposes of business and education, temporarily removes his family to another place, with an intent to return to the home place, and without relinquishing such intent, eventually returns with his family to their home place and occupies it as a homestead before executions are levied on it under judgments obtained during the temporary absence of the family from the home place, the property is exempt from forced sale for the owner's obligations not covered by those mentioned in the homestead Article of the Constitution, the homestead character of the property not being lost by abandonment, the place having been actually occupied as the home, and the circumstances of the absence therefrom being consistent with a continued intent to return to and to occupy and claim the place as the family home.

An Appeal from the Circuit Court for DeSoto County;
John S. Edwards, Judge.

Decree reversed.

Timberlake & Robbins, for Appellants;

Sumter Leitner, for Appellees.

WHITFIELD, J.—It appears that P. R. Read owned in DeSoto County, Florida, not exceeding 160 acres of land not within the limits of any incorporated city or town, upon which he lived with his family, consisting of a wife

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and children; that he moved with his family to the city of Arcadia, in DeSoto County, where he remained some time engaged in business, his children attending school in the city; that subsequently he moved with his family back to the homestead in the county; that later he again moved with his family to the same city where for several years he engaged in business and his children attended school; that during the latter period he voted in the city, but frequently visited the country place formerly occupied as his homestead and gave periodical attention to the upkeep of the place, which was occupied by a tenant, at least a portion of the time, during which period the house that had been occupied by the family burned and another house was erected on the place for residence purposes and so occupied; that during the time Read and his family were living in the city in a house owned by his wife, judgments were obtained against him, but before executions under the judgments were levied on the said country place and before a sale of the place under the judgments and executions, Read, with his family, moved again to and occupied as his home the country property that had been his place of actual residence and homestead place, he testifying that he never intended to permanently abandon the place as his home.

The court adjudged that the said country place had been abandoned as the homestead and that a sale of the place under the executions should proceed. An appeal was taken.

The Constitution contains the following provision:

“A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thou-

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sand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this article." Sec. 1, Article X, Constitution of 1885.

It does not appear that the judgments against Read were on account of the homestead "for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same," therefore if the homestead rights in the country property had not been abandoned by the absence of the family therefrom under the circumstances above stated, the judgments obtained against Read while he actually resided in the city created no liens on the property.

The homestead exemption rights were impressed upon the property before the judgments were obtained against the owner who is the head of a family residing in this State; and before an intentional abandonment of the duly acquired homestead rights in the property clearly appears, the owner with his family again occupy the

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property, claiming that it has remained and it is their home place, before it is proceeded against for sale under executions upon the judgments.

The homestead exemption rights in the property having been duly acquired before the judgments were rendered, unless an intentional and actual abandonment of the exemption rights clearly appear, the property is not subject to liens under the judgments; and when the owner with his family after an absence for business and school purposes again occupy the property, claiming that he has not abandoned his homestead rights therein, a forced sale of the property under executions issued on the judgments is a violation of the organic homestead rights.

The purpose of the homestead law is to secure from forced judicial sale, except in particular instances, the owner's interest or property right in a stated quantity of real estate occupied by the owner or his family as their home place, or having occupied it still claim it as their homestead, though they temporarily reside at another place in the State for purposes of business, education, health or family comfort. The Constitution does not expressly require the owner of a homestead or his family to occupy the home place that may be exempt from forced sale, but the word "homestead" implies occupancy as the home place, though having once in good faith been occupied as the home place, it is not essential that the occupancy should be continuous, provided the intent to return to it as the homestead continues, and the absence therefrom is reasonably shown to be for the temporary benefit of the family. Having once occupied the place as a homestead, the period of absence and the use of the place must be consistent with a bona fide intent to return and with the purpose of the absence, all the relevant cir-

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cumstances being evidentiary in determining each case on its merits. Homestead laws should be liberally applied in the interest of the family home; but the law should not be used to *defraud* creditors. See *Clark v. Cox*, 80 Fla., 85 South. Rep. 173.

Decree reversed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

JAMES HANLEY, *Appellant*, v. D. W. BULLARD AND HIS WIFE, LOUIDA C. BULLARD, *Appellees*.

Opinion Filed October 19, 1920.

1. The five days' notice of a motion to strike certain parts of an answer in chancery, deemed to be insufficient, as provided under Chapter 6907, Laws of 1917, may be waived by the party the sufficiency of whose answer is being thus tested by appearing and arguing upon the merits of the motion and by failure to make objection as to the sufficiency of notice at the proper time.
2. In a suit to enforce a mortgage lien upon land to secure the purchase price of the lands and certain live stock an answer which undertakes to set up the defense of failure or partial failure of consideration of the notes which the mortgage was given to secure, by averring that the complainant did not at the time of the sale own a "great portion" of the live stock, is insufficient where the answer fails to aver in which manner and to what extent the defendant has suffered damage by such averred failure of consideration.
3. Fraud averred to have been practiced by complainant in securing a mortgage lien is without merit as a defense to a

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foreclosure of the lien where no injury or damage to the defendant is shown to have resulted to him from such averred fraud.

4. Where a mortgage is given to secure the payment of three promissory notes and the provisions of the mortgage clearly show that it was the intention of the parties that the mortgagee should have the privilege of electing to treat the entire debt as due upon the failure of the maker of the notes to pay the first or second note at maturity, the omission of the letter "s" from the word "note" appearing in the clauses referring to the indebtedness which the mortgage was given to secure will not defeat the mortgagee's right under the mortgage to foreclose it for the entire debt upon the failure of the maker to pay the note first becoming due.

An Appeal from the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Decree reversed.

Hilton S. Hampton, for Appellant;

Sparkman & Knight, for Appellees.

ELLIS, J.—James Hanley brought suit to enforce a mortgage lien upon certain lands in Hillsborough County against D. W. Bullard and wife. The debt secured by the mortgage was twenty-four hundred dollars, evidenced by three promissory notes of eight hundred dollars each, dated September 20, 1917. One note payable one year after date, one two years after date, and one three years after date. Each note contained a clause in which the maker, D. W. Bullard, agreed to pay a reasonable attorney's fee if it became necessary to collect the note through an attorney. D. W. Bullard and

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his wife executed a mortgage in due form to secure the payment of the notes as they became due. The parties used a "printed form" of mortgage and filled in the blank spaces with a typewriting machine where necessary.

The proviso was in the following language: "Provided always and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors or administrators shall pay to the said party of the second part, his executors, administrators or assigns *three* certain promissory note of even date herewith," etc.

In this connection the word "note" instead of notes is used. Wherever the indebtedness is referred to in this peculiarly worded document the word "note" instead of "notes" is used. "And until the payment of said 'note' they shall pay all taxes," etc. The said parties of the first part for themselves, etc., "do promise, covenant and agree to pay to the said party of the second part, his executors, administrators or assigns the said sum of money and interest as mentioned in said promissory *note*," etc.; "and if default shall be made in the payment of the said sum of money or any part thereof as provided in the said 'note,' or if the interest that may become due thereon or any part thereof shall be behind and unpaid for the space of thirty days then and from thenceforth it shall be optional with the said party of the second part, his executors, administrators or assigns to consider the whole of said principal sum expressed in said 'note' as immediately due and payable." The parties of the first part were to pay all taxes, assessments, insurance premiums that may be imposed upon the premises, to pay all costs, charges and expenses in collecting the moneys secured, including reasonable attorney's fees, etc., "and

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any and all moneys paid out by the said party of the second part by reason of the default of the parties of the first part to pay the moneys so stipulated, shall draw interest at the same rate as the promissory 'note' aforesaid," etc.

The bill was filed on March 26th, 1919, six months after the first of the three notes became due. The bill alleged that the note was unpaid and payment had been demanded, that the complainant had elected to consider the whole of the indebtedness as immediately due and payable, and prayed that the court order and decree that the defendants do pay or cause to be paid to the complainant in a short time to be fixed by the court "the amount so found to be due for principal, interest and a reasonable solicitor's fee" for complainant's solicitor, and upon the defendants' failure to "comply with the terms of the decree" that the mortgaged premises be sold, etc. There was a prayer for general relief.

The defendants answered the bill, denying their indebtedness to the complainant and averring that the complainant had deceived them in a trade whereby they had become the purchasers of complainant's land and transferred to him their property, and that because the complainant had misrepresented the ownership and value of the live stock and farm implements which he agreed to sell and transfer to the defendants with the land, the defendants did not deem the indebtedness to be valid nor the mortgage enforceable. They also denied that under the terms of the mortgage the complainant was not "entitled" "to claim the entire amount thereby secured as due and owing at the time of filing said bill of complaint." The answer prayed that the notes and mortgage be delivered up to be cancelled and that an account be

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taken between the complainant and defendants and the valuation of the property represented by complainant be ascertained and the portion thereof that he falsely represented that he owned be deducted from the amount that may be found to be due from the defendants, if any.

The complainant filed two exceptions to the answer upon the grounds of impertinence. The first embraced all that part of the answer in which the defendants set up the misrepresentations made by the complainant as to the live stock and equipment with which the lands of the complainant were represented by him to be supplied, and the second exception embraced that portion of the prayer of the answer that the notes and mortgage be delivered up to be cancelled.

The Chancellor overruled the first exception and sustained the last, stating in his order that the mortgage could only be foreclosed for the "*note*" now due. The order was made October 23, 1919, one month and three days after the second note became due.

There is some confusion in the record at this point. On October 29, 1919, the complainant moved for relief to amend his bill by adding a prayer for relief to the effect that if the court should decree that the mortgage may be foreclosed for "one installment only, to-wit, the first note thereof," then that the court would direct the proceeds from the sale of the lands to be paid into the registry of the court to await the maturity of the remaining "notes," etc. An order was made on the 28th of October, 1919, that after argument of exceptions to defendants' answer, etc., "it is ordered that the said motion be and the same is hereby granted." The defendant was given fifteen days in which to file answer to bill as amended. We assume that the order relates to the motion for relief

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to amend made a day after the order was signed. The record does not show that the amendment was made.

On November 13th, 1919, the defendants filed their amended answer. We set out here the answer in full, because it presents the defense offered to the bill more clearly than a condensed statement would be.

“Now comes the defendants D. W. Bullard and Louida C. Bullard his wife, by their solicitors, Sparkman & Knight, in the above entitled cause, and saving and reserving unto themselves all rights that may be had or taken to except to the many errors and insufficiencies in said bill of complaint contained and answer said bill, or so much thereof as these defendants are advised is material for them to make answer unto, answering say: these defendants deny that they, or either of them, was on the 20th day of September, 1917, indebted to the complainant in the sum of \$2,400.00 or any other sum whatsoever (but assert the truth to be that these defendants were then and there the owners of certain property in Hillsborough County, Florida, of great value, to-wit, of the value of.....Dollars, all of which was known to said complainant, and said complainant, conniving and colluding with one D. W. Ross, who was then and there the agent of the complainant, did on said date falsely represent unto these defendants that the complainant was the *owner* of the land described in the complainant's bill of complaint; that the same was a farm, well stocked with live stock, farming implements and other equipment, thereon situate, and that the said complainant and his said agent, after representing that the complainant was the *owner* of the said farm and *live stock* thereon, together with the farming implements and equipment on said farm, did offer to trade same to these defendants for

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the property owned by these defendants as before alleged; that these defendants believing the representations made by the complainant and his said agent, that the complainant was the owner of said *farm* with live stock thereon, together with the farming implements and equipment thereon situated, did agree to and with the complainant to trade the property so owned by these defendants for the property which was represented by the complainant and his said agent as being owned by the complainant, and these defendants in furtherance of said agreement did make and execute and deliver good and sufficient deeds of conveyance for their property above alleged to the complainant, and the complainant then and there executed a deed to the *land* described in the complainant's bill of complaint, but did not include therein the live stock, farming implements and equipment which formed a great portion of the consideration for said transaction and deal between the complainant and these defendants. (These defendants further allege that all or a great portion of the live stock, farming tools and equipment, sold by said complainant to these defendants in the deal above set forth, was not, and never has been the property of the complainant, and that the sale or trading of same by the complainant to these defendants was done with intent to deceive these defendants. These defendants further allege that the said complainant insofar as the live stock, farming implements and equipment, or a great portion thereof, which the complainant represented that he owned and was traded to these defendants, was known by the complainant at the time of making said trade, not to belong to him but said representations of ownership were made by said complainant and his said agent with intent to deceive these defendants into making and executing the deeds of conveyance made and

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delivered to the complainant, as above alleged, and in making, executing and delivering of the notes described in the complainant's bill of complaint and the mortgage on the property described in the bill of complaint securing said notes. These defendants further allege that believing that the representations made by the complainant and his said agent as to the ownership of the live stock, farming tools and equipment above mentioned to be true, these defendants made, executed and delivered deeds of conveyance to their property above mentioned, and further believing said representations to be true, made, executed and delivered the notes described in the complainant's bill of complaint, and the mortgage therein described, securing said notes, all of which matters and things done by these defendants were done believing that the complainant was the owner of the live stock, farming tools and equipment situated on the property described in the complainant's bill of complaint, and had these defendants known that said representations of ownership made by the complainant and his said agent, were untrue, as they were, these defendants would not have made and executed the mortgage and notes described in the complainant's bill of complaint.)

"These defendants, further answering said bill of complaint, deny that the complainant is entitled under the terms of the mortgage sought to be foreclosed to claim the entire amount thereby secured, as due and owing at the time of filing said bill of complaint. (These defendants, further answering said bill of complaint, say that subsequent to the filing of said bill of complaint, to-wit, on the 20th day of September, 1919, the second one of said notes secured by the said mortgage fell due and prior thereto that these defendants tendered to the complainant the full amount of said note and the interest thereon; and

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the said complainant refused to accept the same or to surrender the notes so falling due. And these defendants further allege that from said date above alleged that these defendants have stood ready to pay said note falling due on the 20th day of September, 1919, but the said complainant persists in his refusal to accept the same.) These defendants, having fully answered said bill of complaint, pray that said notes and mortgage be delivered up to be cancelled, and that an accounting be taken in this honorable court between the complainant and these defendants (and the valuation of the property represented by the complainant and his said agent be ascertained and the portion thereof that the complainant and his said agent falsely represented that he owned be deducted from the amount that may be found to be due from these defendants to the complainant, if any), and these defendants expressly offering to pay any difference found to be due from them to the complainant upon said accounting, and pray that if upon said accounting the complainant be found to be indebted to these defendants, that a decree be entered against said defendants for the sum so found to be due from said complainant to these defendants, and for such other and further relief in the premises as to Your Honor shall seem meet."

The complainant moved to strike those portions of the answer embraced in parentheses. The motion was granted as to those portions of the answer included in the first and third parentheses and overruled it as to that portion included in the second. The court allowed the defendants until December 10th, 1919, to "further plead" to the bill.

The record recites that on that date the "*defendants* filed amendment to the *bill* of complaint." An inspection

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of the document filed, however, shows that it was the answer which was amended. The amendment to the answer averred that subsequently to the filing of the bill a second note secured by the mortgage became due on September 20th, 1919, and that prior to that date the defendants tendered to the complainant the "sum of \$928.00, the same being the amount due on said note so falling due, together with the interest thereon in full," etc.; that the complainant refused to receive the same, and the defendants attached to their answer and made it a part thereof a "certified check for \$928.00, payable to the complainant," which it is averred the defendants are willing to deliver to the complainant "upon surrender and cancellation of the note above mentioned."

The cause came on to be heard on December 15, 1919, the complainant offered the original mortgage and three notes in evidence. The defendant objected to the introduction in evidence of the last note; that is to say, the one to become due September, 1920, according to its terms. The parties agreed that \$50.00 would be a reasonable solicitor's fee for filing the bill and 10% upon the amount decreed by the court to be due for principal and interest. It was also agreed that at the time the second note became due, defendants sent by mail to the complainant a certified check on the Exchange National Bank of Tampa, payable to complainant for the full amount of second note, principal and interest, and complainant refused that "tender;" that the check is attached to the answer as amended and filed as "defendants' tender of \$928.00;" that there has been no other tender and that no part of the indebtedness has been paid other than the "tender for the second note maturing September 20, 1919."

The court decreed the equities to be with the complain-

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ant; that he was entitled to foreclosure as to the first note only; the second and third notes did not mature under the terms of the mortgage by the failure to pay the first note and interest at maturity; that as to the second note the defendant made a valid tender on the date of maturity, and that complainant is entitled to no costs or counsel fees for the collection of that note, nor to any interest after September 20th, 1919; that there is due on the two notes "*now due*" the sum of \$1,600.00 principal and \$278.00 interest. The sum of \$145.00 is allowed as a reasonable attorney's fee. The defendants were decreed to pay the amount so found to be due within five days, and in default the lands were to be sold, the proceeds of the sale applied to the amount found to be due, and the amount remaining on hand should be paid into the registry of the court to the amount of \$800.00 and interest for three years from September 20, 1917, at 8% per annum to await the maturity of the last note. There were other provisions in the decree relating to the indebtedness represented by the last note, which are unnecessary to be quoted.

The complainant appealed from the decree and assigned six errors. That the court overruled exceptions to the answer; in denying complainant's right to foreclose the mortgage for the entire sum; in denying by his order of November 26th, 1919, the motion of complainant to strike certain portions of defendant's answer; in refusing the complainant to introduce in evidence the third note; in permitting the defendants to amend their amended answer, and in rendering the final decree.

The defendants filed cross assignments of error complaining that the court erred in entering the order of November 26, 1919, granting the motion to strike cer-

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tain portions of the answer and in entering the final decree.

Taking up for consideration first the cross assignments of error made by the appellees we find no merit in the point that they did not have sufficient notice of the complainant's motion. Appellees contend that they should have had five days notice of the complainants motion to strike the answer, or portions of it. The record in this case will not bear strict criticism from several points of view. The motion to strike together with notice to defendant's counsel are copied into the record. The record recites that on November 26th, 1919, the *motion* was filed, but the notice bears no date. It, however, does state that "complainant by counsel has this day filed motion to strike," etc. This indicates that both notice and motion were given and made the same day. However the judge's order recites that he "heard the argument of both counsel thereupon." Solicitors for defendants seem to have appeared in response to the notice and argued the motion, they appear to have raised no objection to the failure of complainants solicitor to give five days' notice of the motion, as required by Section 3 of Chapter 6907, Laws of Florida, 1915.

The failure to make the objection then was a waiver of the notice required by the statute. That requirement was not jurisdictional and the cause of the defendants appears not to have been injured by the lack of sufficient notice. The record discloses the fact of notice only in the judge's order, which, as stated, recites that "both counsel" were heard. The written notice copied into the record bears no evidence of having been served, but solicitors for defendants appeared and argued the motion. They must necessarily have had notice, therefore, how-

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ever short. It is true the statute secured to them the right to have five days notice of the motion, which of course they knew, but their appearance and argument on the motion and failure to object to the irregularity of the notice, if there was in fact any irregularity, were inconsistent with their intention to rely upon their right.

The principle of estoppel upon which the doctrine of waiver rests applies in such case. See *State Insurance Co. of Missouri v. Todd*, 83 Pa. St. 272, 40 Cyc. 259-267.

Solicitors for appellees insist that the matter stricken from the amended answer constituted a valid defense or counter claim which it was permissible for him to set up under Chapter 6907, Laws of Florida, 1915. If the matter set up was such that it might be the subject of an independent suit in equity against the complainant and arose out of the transaction which was the subject-matter of the suit, then it constituted a good defense and should not have been stricken, because the remedy is a severe one and should not be resorted to except in cases palpably requiring it for the proper administration of justice. See *Ray v. Williams*, 55 Fla. 723, 46 South. Rep. 158; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 South. Rep. 922. If, however, that portion of the answer stricken was wholly irrelevant to the cause or improper and not merely bad for defective statement, there was no error in striking it. See *Craft v. Smith*, 45 Fla. 222, 33 South. Rep. 996; *Parkhurst v. Stone*, 36 Fla. 456, 18 South. Rep. 594; *Russ v. Mitchell*, 11 Fla. 80; *Hammond v. A. Vetsburg Co.*, 56 Fla. 369, 48 South. Rep. 419; *Fidelity & Deposit Co. of Maryland v. Aultman*, 58 Fla. 228, 50 South. Rep. 991. That part of the answer relating to the representations by complainant concerning his ownership of the "farm and live stock thereon" and the

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farmimg implements and equipment on the farm as forming a great part of the consideration for the transaction between the complainant and the defendant, appears to be an attack not upon the title to the lands described in the mortgage, but upon the notes for partial failure of consideration. It is averred that complainant said he was the owner of the land; that it was a farm well stocked with live stock, farming implements and other equipment; that he was owner of all; that the complainant and defendants agreed to trade, the latter conveying their "property" to complainant who in turn conveyed his "land" to them, but did not include the live stock, etc. Defendants then executed the notes and mortgage upon the land which had been conveyed to them by complainant. It is averred that "a great portion" of the live stock, farming implements and equipment which was "traded" to the defendants was not owned by the complainant and if they had known it they would not have executed the mortgage and notes. Whether the defendants obtained possession of the live stock, implements and equipment, whether the complainant has since acquired title to it and saved the defendants from loss, what loss if any they have actually suffered because complainant did not at the time of the trade own all the live stock, etc., in what way they have suffered damage and to what extent if at all is not averred and does not appear from the answer. As a plea of failure or partial failure of consideration it is utterly without merit. See *Jones v. Streeter*, 8 Fla. 83; *McCallum v. Driggs*, 35 Fla. 277, 17 South. Rep. 407. It contains no averment that renders the rather lengthy history of the transaction at all relevant as a plea of failure of consideration. It is insisted that the answer sets up a fraud practiced by the mortgagee so that the counter claim is within the provi-

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sions of Chapter 6907 *supra.* But whatever fraud is averred is without damage or injury to defendants so far as there are any averments of injury in the answer. In averring fraud in procuring the mortgage the resulting injury to defendants should be averred. See *Allen v. United Zinc Co.* 64 Fla. 171, 60 South. Rep. 182.

The defendants made the trade upon the complainant's representation that he owned the stock and equipment which were on his land or farm. Whether he owned the stock at the time or not is immaterial if he subsequently acquired the property, the defendants went into possession and have sustained no injury by loss of their possession.

It cannot be inferred that injury resulted to the defendants in that they have been deprived of the possession of any of the personal property. The answer was without merit as a defense upon the ground of fraud to the enforcement of the mortgage lien. If every averment in the answer was admitted to be true, it could have no influence in the decision of the suit. For anything appearing to the contrary the defendants are in possession of all the property, lands, live stock, implements, etc., and only fear that they will be dispossessed of a "portion" of the personal property. The answer constitutes no defense to the enforcement of the mortgage lien. See *Randell v. Bourgardez*, 23 Fla. 264, 2 South. Rep. 310; *Paine v. Kemp*. 77 Fla. 531, 82 South. Rep. 53. And as it constitutes no counter-claim for the cancellation of the notes for fraud, nor cancellation for failure of consideration, it was irrelevant to the cause and improper, and there was no error in striking it.

It follows that there was no error in striking that portion of the prayer for a valuation of the property which

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the complainant falsely said he owned and that amount deducted from the indebtedness represented by the notes then due.

The assignments of error made by appellant in which complaint is made of the court's orders in overruling exceptions to certain parts of the defendants' answer and denying the complainant the right to foreclose the mortgage for the entire sum secured by it, and denying complainant's motion to strike that portion of the answer setting up a tender of payment of the second note and interest, and refusing to allow complainant to introduce in evidence the third note and in entering the decree for the amount stated, are well taken and the decree should be reversed because of the errors committed.

The provisions of the mortgage clearly show that the intention of the parties was that in the event of the failure of the maker of the note to pay the notes as they became due with interest the mortgagee may elect to treat the entire debt as due and may foreclose the mortgage to enforce payment.

The omission of the letter "s" at the end of the word "note" when the context clearly showed that the plural and not the singular form of the word was intended does not serve to defeat the intention of the parties.

The decree is reversed with instructions to enter a decree for the entire sum represented by the three promissory notes, together with interest according to the terms of the note and a solicitor's fee in accordance with the terms of the stipulation entered into between the parties.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Davis v. Leighton—Syllabus.

J. R. DAVIS, *Plaintiff in Error*, v. B. D. LEIGHTON, *Defendant in Error*.

Opinion Filed October 22, 1920.

1. In an action upon a promissory note a plea of failure of consideration sworn to casts the burden of proof on plaintiff and this burden is not met by the introduction of the note alone without other proof.
2. In an action solely between an endorser and his immediate endorsee of a negotiable instrument a want or failure of consideration may constitute a good defense.

A Writ of Error to the Circuit Court for Polk County;
John S. Edwards, Judge.

Reversed.

Brady & Taylor, for Plaintiff in Error;

Wilson & Boswell, for Defendant in Error.

WEST, J.—This was an action by defendant in error as plaintiff against plaintiff in error as defendant as endorser of a promissory note made by B. G. Estridge and M. C. Estridge, payable to plaintiff.

The declaration is in the usual form. It alleges, in substance, the making of the note, defendant's endorsement of the note, its delivery, failure of the maker to pay the note and notice of non-payment to plaintiff.

The defendant filed pleas to the declaration, which, omitting formal parts, are as follows:

"Comes now the defendant, J. R. Davis, by his attorney,

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J. W. Brady, and for plea and answer to the plaintiff's cause of action says that there has been a total failure of consideration upon this defendant's endorsement of the note sued upon by the plaintiff, and that this defendant should not be required to answer unto the plaintiff for the following reasons, to-wit:

"1. This defendant shows that prior to the date of the note sued upon by the plaintiff that the said plaintiff, B. D. Leighton, and the B. G. Estridge named in plaintiff's declaration were partners doing business in Bartow, Florida, under the firm name and style of the Polk County Produce Company, and that there came a time when the said B. D. Leighton desired to dispose of his interest to the said B. G. Estridge and to the said M. C. Estridge, the wife of the latter and the daughter of this defendant. That he induced the said Estridge and wife to buy out his interest in said business, giving him notes therefor to be secured by the endorsement of this defendant, who was and is the father of M. C. Estridge. That before this defendant would endorse said notes he required the said B. D. Leighton to give him an itemized statement of the outstanding indebtedness of said partnership business, which the said B. D. Leighton pretended to do, giving him a list of certain outstanding accounts, which he then and there stated was all the indebtedness then due by said firm, and upon said statement this defendant endorsed the note sued upon; whereas, in truth, there was another outstanding indebtedness against the said B. G. Leighton and B. G. Estridge, which the said B. D. Leighton then and there knowingly and designedly concealed from this defendant for the purpose of having him endorse said note and other notes, said indebtedness being due to the Miller-Jackson Company, Wholesale Dealers of Tampa, Florida, for the amount of \$1,284.00, which was then and there a

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just, due and unpaid account existing against the said B. D. Leighton and B. G. Estridge, doing business as the Polk County Produce Company, and which was unknown to this defendant at the time he made said endorsement and which he has since had to pay off and discharge by reason of having by his endorsement of three notes to the said B. D. Leighton substituted his daughter, the said M. C. Estridge, into the business of the Polk County Produce Company in the stead of the said B. D. Leighton.

"2. For a further plea this defendant further shows that by reason of the deception and fraud of the said B. D. Leighton in concealing from him the fact of the indebtedness of the said Polk County Produce Company to the said Miller-Jackson Company to the amount of \$1,284.00, and of the fact of the present insolvency of the said parties constituting the Polk County Produce Company as alleged by plaintiff; that the said B. D. Leighton has become indebted to this defendant in the sum of \$1,284.00, besides interest from the day of, 1917, for which this defendant prays judgment against the said plaintiff.

"3. For a further plea in this behalf this defendant says that since the institution of the plaintiff's suit against this defendant that this defendant has been garnished by a firm styled The Coe-Mortimer Company in a suit now pending in the Circuit Court of Polk County against the said B. D. Leighton for a large amount, to-wit: an amount larger than that of the note sued on in this action, and that this defendant is not advised as to the merits of the suit in which this defendant is garnished."

The pleas were under oath of the defendant. Demurrers to the pleas were overruled as to the first and second

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and sustained as to the third and the parties proceeded to trial. Upon the trial the note bearing defendant's endorsement was introduced in evidence by plaintiff. Plaintiff testified that the note had not been paid. He was then asked what was the consideration for the note and replied, "My interest in Polk County Produce Company." The plaintiff then rested. Defendant offered no evidence.

There was a directed verdict for the plaintiff. From the judgment entered thereon the defendant took writ of error.

The case was tried upon the theory that the pleas contained averments sufficient to present the issue of failure of consideration for the note. The pleas being sworn to, the burden of proof upon this issue under the statute (Sec. 1465, Gen. Stats., 1906) was upon the plaintiff. This burden was not met by introducing the note, bearing defendant's endorsement, in evidence with no other evidence than the statement of plaintiff that the note was given him for his interest in the "Polk County Produce Company," no proof being offered that such interest was of any value. The burden being upon the plaintiff to prove the consideration, it cannot be inferred, in the absence of proof of any value, that his interest in the company mentioned was a sufficient consideration. Sec. 1465, Gen. Stats., 1906, Sec. 1465, Florida Compiled Laws. *White v. Camp*, 1 Fla. 94; *Prescott v. Johnson*, 8 Fla. 391; *Reddick v. Mickler*, 23 Fla. 335, 2 South. Rep. 698; *Smith v. LeVesque & Anderson*, 25 Fla. 464, 6 South. Rep. 263; *Dicks v. Johnson*, 66 Fla. 306, 63 South. Rep. 700.

The burden of proof upon the issue made not having been met by plaintiff, there was error in directing a ver-

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dict for him, and the judgment must therefore be reversed.

BROWNE, C. J., AND TAYLOR AND WHITFIELD, J. J., concur.

ELLIS, J., dissents.

ELLIS, J., dissenting:

The plea is an affirmative defense in which the defendant seeks to avoid the obligations of an endorser because of the alleged deceit and fraud of the plaintiff. The burden of proof was upon the defendant thereon. The judgment should be affirmed.

THOMAS W. FIELDING AND EVANS HAILE, *Appellants*, v.
JOHN J. BARR, *Appellee*.

Decision Filed October 22, 1920.

An Appeal from Orders of the Circuit Court within and for the County of Alachua; James T. Wills, Judge.

W. S. Broome, for Appellants;

Hampton & Hampton, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Orders aforesaid, and briefs and argument of counsel for the respective parties, and the record having been

Turner et al. v. Harris et al.—Decision of Court.

seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said Orders; it is, therefore, considered, ordered and adjudged by the Court that the said Orders of the Circuit Court be, and the same are hereby, affirmed.

BROWNE, C. J., AND WHITFIELD AND WEST, J. J., concur.

TAYLOR AND ELLIS, J. J., disqualified.

JAMES M. TURNER, MARY JANE SANDS AND ——— SANDS, HER HUSBAND; MARIA V. WALKER AND ——— WALKER, HER HUSBAND; WILLIAM H. TURNER, HARRIET SELLENER AND ——— SELLENER, HER HUSBAND, *Appellants*, v. L. A. HARRIS AND ——— HARRIS, HIS WIFE, J. V. HARRIS, AND ——— HARRIS, HIS WIFE; MATTIE HARRIS RICHARDS AND ——— RICHARDS, HER HUSBAND; MARY PERKINS HARRIS, EMMA COLLIER, WIFE OF JOHN COLLIER, DECEASED; ALTON W. COLLIER AND MARY PAULINE COLLIER, A MINOR, *Appellees*.

Decision Filed October 22, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Monroe; H. Pierre Branning, Judge.

Taylor & Taylor and *Atkinson & Burdine*, for Appellants;

W. Hunt Harris, for Appellees.

Polk et al. v. White et al.—Decision of Court.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

ANNIE POLK ET AL, *Appellants*, v. ALBERT WHITE ET AL,
Appellees.

Decision Filed October 22, 1920.

An Appeal from a Decree of the Circuit Court within and for the County of Santa Rosa; A. G. Campbell, Judge.

W. W. Clark, for Appellants;

McGeachy & Lewis, for Appellees.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of

Evans v. Weathers—Decision of Court.

its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

**L. W. EVANS, DOING BUSINESS AS EVANS AUTO EXCHANGE,
Plaintiff in Error, v. L. P. WEATHERS, *Defendant
in Error*.**

Decision Filed October 22, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

Dickenson & Dickenson, for Plaintiff in Error;

Harry N. Sandler, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Jacksonville Term. Co. et al. v. Miller—Syllabus.

WARREN T. MACK, *Appellant*, v. MARTHA T. MACK,
Appellee.

Decision Filed October 22, 1920.

An appeal from a decree of the Circuit Court within
and for the County of Hillborough; F. M. Robles, Judge.

G. H. Cornelius, for Appellant;

Mabry & Carlton and *William L. Pencke*, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

JACKSONVILLE TERMINAL COMPANY, A CORPORATION, AND
JAMES C. BLANTON, *Plaintiffs in Error*, v. SAMUEL A.
MILLNER, SUING FOR HIMSELF AND THE PUBLIC AT LARGE,
Defendants in Error.

Opinion Filed October 22, 1920.

Where a common carrier in making and executing a contract violates its legal duties to its patrons, and a remedy therefor is

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afforded by law through action taken by the Railroad Commissioners or through proceedings to annul the contract if found to be *ultra vires*, a writ of mandamus to compel a disregard of the contract will not be granted.

A Writ of Error to the Circuit Court for Duval County; Daniel A. Simmons, Judge.

Judgment reversed.

John E. and Julian Hartridge, for Plaintiffs in Error;

Reynolds & Rogers, for Defendants in Error.

WHITFIELD, J.—A peremptory writ of mandamus was awarded by the Circuit Judge for Duval County, commanding the terminal company and its superintendent,

“First, to receive, accept and keep in the baggage room at the union depot in Jacksonville, Florida, the personal baggage of all persons presented by any drayman or transfer agent when marked by an identification tag attached by such drayman or transfer agent, upon the same terms, conditions and in a similar manner as you receive, accept and keep the personal baggage of persons presented by any other drayman or transfer agent.

“Second, to issue railroad baggage checks to all passengers for their baggage when they shall present to the employe of you, the said Jacksonville Terminal Company, or to the employe of you, the said James C. Blanton, acting as superintendent of said depot, engaged in the duty of issuing such railroad checks at the checking-room in the union depot in Jacksonville, Florida, their railroad tickets and also the duplicate of the identification tag

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attached to said baggage when delivered at said baggage room.

“Third, to cease and desist from requiring any passenger presenting such railroad ticket and duplicate identification tag issued by any drayman or transfer company or agent to identify his baggage in any manner other than by surrender of such tag, or to pay a fee or charge, as a condition for the issuance of such railroad baggage check.

“Fourth, and that you make due return to this court in compliance with this writ; and herein you shall fail not.”

A writ of error was taken and briefs were filed on the merits.

Without considering the propriety of the parties to the proceeding, the application of the writ appears to be mistaken.

The particular acts commanded are not specifically required by a statute or by the common law so as to warrant judicial action without reference to other tribunals having cognizance in the matter; and if a legal duty exists in the premises by reason of abuses, unjust discriminations or excessive charges in “furnishing facilities,” for the “convenience and proper accommodation of passengers” or in other matters covered by the statutes, relative to the regulation of common carriers, the duty depends upon the application of general provisions of statutes to particular facts, as to which the Railroad Commissioners are given authority, and the courts will not anticipate the action of that tribunal. *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 53 Fla. 650, text 687,

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44 South. Rep. 213; State *ex rel.* Sunday v. Richards, 50 Fla. 284, 39 South. Rep. 152.

If the discrimination complained of is the product of an *ultra vires* contract, the State has its appropriate remedies. See 22 R. C. L. 677.

In State *ex rel.* Ellis v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 South. Rep. 223; State *ex rel.* Attorney General v. Atlantic Coast Line Ry., 52 Fla. 646, 41 South. Rep. 705, and similar cases, no other tribunal had authority in the premises, and the Attorney General of the State was the relator.

While the powers of the Railroad Commissioners are purely statutory, the statutes conferring powers on them contain provisions that are predicated upon the common law duties of common carriers as well as provisions imposing duties upon carriers not covered by the common law. The common law forbids unjust discriminations by common carriers in rendering public service, but it does not impose duties as to the erection of depots at particular points by the joint action of unrelated corporations. Statutory powers as to the former class of duties may be general, while those relating to the latter class should be explicit and definite.

In State *ex rel.* Burr v. Jacksonville Terminal Co., 71 Fla. 295, 71 South. Rep. 474, the particular power asserted by the railroad Commissioners has no relation to the common law duties and depend entirely upon the specific terms of the statute.

If the discrimination alleged in this case is predicated upon violation of a common law duty that is covered by the general or specific powers conferred upon the Railroad Commissioners, application should be made to them

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for relief. See State *ex rel.* Ellis v. Atlantic Coast Line R. Co., 53 Fla. 650, text 688, 44 South. Rep. 213.

The judgment awarding the peremptory writ of mandamus is reversed and the cause is remanded with directions to dismiss the alternative writ of mandamus issued herein.

BROWNE, C. J. AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

PHILIP MORRILL AND HOWARD MORRILL, CO-PARTNERS, DO-
ING BUSINESS AS MORRILL BROTHERS, *Appellants*, v. S. O.
BURG AND LENA BURG, HIS WIFE, *Appellees*.

Opinion Filed October 23, 1920.

1. An answer in chancery not signed by defendants, whose answer it purports to be, may be stricken from the files on motion, or it may be ignored and a decree pro confesso entered against such defendants.
2. The signing by defendants of their answer in chancery may be waived by complainants in like manner and to the same effect as the verification of such answer by oath of defendants, whose answer it purports to be, may be waived.
3. Where complainants file replication to an answer in chancery defective in that it is not signed by defendants, whose answer it purports to be, they will be held to have waived the signing of such answer by defendants.
4. Where complainants, after the filing of an answer by defendants, in an application for the appointment of a special master to take testimony in said cause, represent to the court that the cause is at issue upon bill and answer of de-

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fendants, and such application is granted and a special master appointed, the court reciting in the order appointing such master that the cause is at issue upon bill and answer of defendants, complainants will not thereafter be permitted to disregard such answer because unsigned by defendants, and, without giving notice to defendants, take decree pro confesso against them and proceed in said cause to final decree, but will be held to have waived the signing of the answer by defendants.

5. Under the provisions of Chapter 6907, Acts of 1915, unless the answer of defendants "asserts a set-off or counter-claim no reply should be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the complainant."
6. When a cause is at issue upon bill and answer a decree pro confesso and subsequent proceedings ignoring the answer, taken without notice to defendants, are unauthorized.

An Appeal from the Circuit Court from Hillsborough County; F. M. Robles, Judge.

Affirmed.

Lunsford & Whitaker, for Appellants;

E. L. Bryan, for Appellees.

WEST, J.—Suit was brought to foreclose a lien upon certain described land of defendants for the value of labor performed and material furnished by complainants in the construction of certain permanent improvements placed upon such land.

Demurrer to the amended bill was overruled and defendants answered. Verification of the answer was

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waived. The answer was signed by counsel, but was not signed by defendants.

After the answer had been filed counsel for complainants filed their application in the following language for the appointment of a special master to take testimony in the case: "Now come the complainants above named, by their solicitor, S. V. Ray, and respectfully represent to the court that the said cause is at issue upon the bill of complaint and the answer of the defendants, and applies to the court for the appointment of a special master in chancery to take the testimony in the said cause and to report the same to the Court without findings."

The motion was granted, and in the order the court recited that the cause was at issue on bill and answer and appointed a special master to take the testimony of the parties, directing him to report the same to the court without delay. This order is dated October 31, 1917. On November 20, 1917, attorneys for the respective parties entered into the following agreement: "It is agreed by and between counsel for the respective parties above named and the Special Master, G. H. Cornelius, shall set the cause down for hearing before him and commence the taking of testimony therein on Friday, the 30th day of November, 1917." This agreement is duly signed by the attorneys for complainants and defendants.

On January 24, 1919, other attorneys then representing complainants, moved the court for a decree pro confesso against defendants on the ground that the paper writing filed in said cause purporting to be an answer of defendants is no answer and is a nullity because not signed by defendants. This motion was granted and a decree pro confesso was entered against defendants. Thereafter the order previously made appointing a special master was re-

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voked and another special master was appointed for the purpose of taking testimony and reporting the same to the court. Testimony accordingly was taken, and thereafter a final decree in favor of complainants was entered on March 4, 1919. Pursuant thereto the land described in the bill upon which the improvements had been placed by complainants was advertised and sold to complainants in satisfaction of their claim for labor and material, and the sale, upon report of the special master, was confirmed by the court in an order dated April 8, 1919.

The entry of the decree pro confesso and subsequent proceedings thereon were taken without notice to defendants. On April 14, 1919, defendants filed a motion to vacate and set aside the decree pro confesso theretofore entered against them and all subsequent proceedings and orders in said cause, and this motion upon hearing was granted. In granting this motion the court gave the following reasons for doing so: "By stipulation of counsel in the said cause, the Master, G. H. Cornelius, was appointed to take the testimony, after bill and answer in the cause had been filed, and in the opinion of the court the defect in the answer of not being properly signed was waived by the stipulation and the action of the parties thereto, and that the court should not have set aside the actions of the parties without due notice to all parties concerned."

An answer not signed by defendants whose answer it purports to be may be stricken from the files on motion or it may be ignored and a decree pro confesso entered against such defendants, but the signing by defendants of their answer may be waived by complainants just as the verification of the answer by oath of defendants may be waived. *City of Ocala v. Anderson*, 58 Fla. 415, 50 South.

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Rep. 572; Ballard v. Kennedy, 34 Fla. 483, 16 South. Rep. 327. And where complainants file replication to an answer defective in this respect they will be held to have waived the signature of defendants thereto. 1 Enc. of Pl. & Pr., p. 828; Collard v. Smith, 13 N. J. Eq. 43; Fuller Bank v. Beach, 2 Paige Ch. Rep. 307.

In the case under consideration no replication was filed, but complainants in their application for the appointment of a special master represented to the court "that the cause is at issue upon bill of complaint and the answer of defendants," and in granting this motion and appointing the special master, the court, as we have seen, recited that "the said cause is at issue on the bill of complaint and answer of defendants." Twenty days after this motion and order were filed complainants' attorney agreed with defendants' attorney that the special master should set the cause down for hearing and commence the taking of testimony on the fixed date ten days thereafter. In this situation it was not error for the court to hold that the signing of the answer by defendants had been waived. What complainants did was equivalent in effect to filing a replication to the answer. It was a recognition of the answer as valid, and under the statute, the answer being regarded as good, the cause was at issue upon the filing of the answer. Chap. 6907, Acts 1915, Laws of Florida. When complainants have formally represented to the court that the cause is at issue upon bill and answer and upon that theory have procured the appointment of a special master to take testimony and agreed with defendants on a day for taking testimony, they should not be permitted several months later, no action having been taken in the meantime, without notice to defendants, to take decree pro confesso against defendants and proceed to final decree in said cause upon the theory

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that the answer, though previously treated as valid, is, in fact, because of formal defects, insufficient, and thereby shut out defendants from any right to be heard, but in such case will be held to have waived such defect. The signing of the answer having been waived by complainants, the cause was at issue upon bill and answer. Subsequent proceedings, therefore, disregarding the answer were unauthorized and the court did right in vacating and setting aside all such orders and proceedings.

The order appealed from is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

JACKSON BROTHERS LUMBER COMPANY, ET AL, *Plaintiffs in Error*, v. YAEGER & McCASKILL, *Defendants in Error*.

Opinion Filed October 23, 1920.

Where the verdict is a proper one on a fair consideration of all the evidence and no rule of law or procedure has been violated to the material injury of either party, a new trial should not be granted.

A Writ of Error to the Circuit Court for Leon County;
E. C. Love, Judge.

Order reversed.

W. C. Hodges and Fred H. Davis, for Plaintiffs in Error;

Jackson Bros. L. Co. et al. v. Yaeger & McCaskill—Opinion of Court.

W. J. Owen and *Jos. A. Edmondson*, for Defendants in Error.

PER CURIAM.—This writ of error was taken by the plaintiff below to a motion granting a new trial in an action to recover damages for an alleged breach of contract, the contention being that the award of \$196.00 as damages is inadequate. The contract provided for extending a tram road of the defendants in error into a tract of 1360 acres of pine timber of the plaintiffs in error for the purpose of hauling all the *lumber* to be made from the trees on the land. The defendants in error agreed to build and operate the tram road, etc., provided the plaintiffs in error “shall offer for shipment over said tram road an average of two hundred thousand feet of lumber per month for twelve months * * * and thereafter an average tonnage of two hundred thousand feet per month, until all of said timber shall be cut.” It appears that the tram road was not built within the specified time and that before the expiration of twelve months from the agreed date all the timber on the land suitable for *lumber* had been cut and the lumber made therefrom shipped under the contract.

Giving to the contract the force of a covenant in the particular here involved, the timbered lands with reference to which the contract was made, did not yield the expected *lumber* production (as to which there was no covenant), and there were items claimed by the plaintiffs in error to offset the demands of the defendants in error under the contract, and as it cannot be said that the amount awarded as damages could not have been arrived at by a fair consideration of all the evidence under the issues, the motion for new trial should have been denied.

Norwood v. State of Florida—Syllabus.

The order granting a new trial is reversed and the cause is remanded with directions to enter final judgment for the plaintiffs below on the verdict, unless a motion in arrest of judgment, or for judgment non obstante veredicto shall be made and prevail. Sec. 1695 Gen. Stats. 1906, Compiled Laws, 1914; *Bishop v. Taylor*, 41 Fla. 77, 25 South. Rep. 287; *Philadelphia Underwriters' Ins. Co. of North America v. Bigelow*, 48 Fla. 105, 37 South. Rep. 210; *Winn v. Coggins*, 53 Fla. 327, 42 South. Rep. 897; *Feinberg v. Stearns*, 56 Fla. 279, 47 South. Rep. 797; *Georgia Southern & F. R. Co. v. Hamilton Lumber Co.*, 63 Fla. 150, 58 South. Rep. 838; *Nathan v. Thomas*, 63 Fla. 235, 58 South. Rep. 247.

It is so ordered.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

COLUMBUS NORWOOD, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed October 25, 1920.

1. An indictment charging one with the offense of manufacturing alcoholic and intoxicating liquors in a county where the sale of liquors had been prohibited by law, and such offense is alleged to have been committed after the passage of Chapter 7736, Laws of 1918, is not bad because it contains some allegations of fact required by Chapter 7283, Laws of 1917, as to the sale of intoxicating liquors having been prohibited by law in the county where the offense was alleged to have been committed.

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2. Where a bill of exceptions is made up under Rule 103, no assignment of errors is required to be presented to the judge when application is made to him to authenticate the bill.
3. A charge in an indictment that the defendant manufactured alcoholic and intoxicating liquors is not supported by evidence that the defendant had in his possession four gallons of "buck," without any evidence that the liquid was either alcoholic or intoxicating.
4. To support an indictment charging the defendant with the manufacture of alcoholic and intoxicating liquors as a second offense of a like character, it is necessary for the State in proof of the latter allegation to produce the record of the prior judgment of conviction.

A writ of error to the Circuit Court for Gadsden County; E. C. Love, Judge.

Judgment reversed.

W. C. Hodges, J. Baxter Campbell and Fred H. Davis,
for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis,* Assistant, for the State.

ELLIS, J.—In October, 1919, Columbus Norwood was indicted for the "manufacture" of "alcoholic and intoxicating liquors" in Gadsden County. It was alleged that the "sale of liquors" was prohibited in that county by law, and that the accused had theretofore, in May, 1919, in Gadsden County been convicted of manufacturing alcoholic and intoxicating liquors. The offense was alleged to have been committed in July, 1919. A motion to quash the indictment upon the ground that it charged no offense under the laws of Florida was denied.

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It is contended by counsel for plaintiff in error that the indictment charges an offense partly under Chapter 7283, Laws of 1917, and partly under Chapter 7736, Laws of 1918, because it charges that the accused manufactured the liquor in Gadsden County, in which the sale of intoxicating liquor is prohibited by law, and that he had theretofore been convicted in May, 1919, of a like offense, the first condition appearing in the Act of 1917, and the latter in the Act of 1918, neither Act containing both conditions.

Section 23 of Chapter 7736, Acts 1918, provides that the Act shall be "construed as supplementary to the Act approved April 24th, 1917, (Chap. 7283) and so much of said Act as is not clearly inconsistent with the provisions of this Act shall remain in full force and effect throughout the State when this Act goes into effect." The purpose seems to have been to enact a new statute under Article XIX as amended, of the Constitution, and retain as many of the provisions of the old law as possible, upon the theory perhaps that if any delinquent might escape the provisions of the new, he could be caught under the old Act. The indictment seems to have been drawn upon the same principle, which is not to be recommended so far as pleading is concerned, because there is danger always of misleading the accused and embarrassing him in the preparation of his defense, and if the two statutes are in any wise inconsistent or contradictory or define different offenses the indictment would be bad. See *Townsend v. State*, 63 Fla. 46, 57 South. Rep. 611; *Clark v. State*, 68 Fla. 433, 67 South. Rep. 135. This indictment, however, cannot be said to be so vague and indefinite as to mislead the accused. The manufacture of alcoholic or intoxicating liquors in a county which had voted against the sale of such liquors was an offense under the

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Act of 1917, but under the Act of 1918, it was an offense whether the county had voted against such sale or not. The Act of 1917, therefore, being inconsistent with the latter Act in this particular, was superseded by the new; that is to say, in so far as the Act of 1917 limited the offense to the manufacture of liquor in those counties which had voted against the sale of intoxicating liquors. So much of the indictment therefore as charged the sale of intoxicating liquors in Gadsden County to be prohibited by law was mere surplusage; the allegation was true as to any county in the State. Chapter 7736, Laws of 1918, which became effective in January, 1919, made it so. As the offense as defined by the Act of 1917 was abrogated, the defendant could not have supposed that he was accused of crime under that Act, as the offense was alleged to have been committed in July, 1919, six months after the new Act became effective.

The case of *Shields v. State*, 78 Fla. 524, 83 South. Rep. 391, relied upon by counsel for plaintiff in error, is not in point. Shields was charged with an offense alleged to have been committed *prior* to the enactment of the statute under which he was indicted. In that case the terms of the new Act were essentially different from those of the Act which was in force when the offense was alleged to have been committed. There was no error in denying the motion to quash the indictment.

The Attorney General has made two motions in this case, both filed upon the same day. One to strike the bill of exceptions upon the ground that no "assignment of errors was filed or presented with said bill of exceptions" and no notice was given to the opposite party of the settling of the bill of exceptions. It appears from the certificate of the judge that the first ground is true. There is

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no proof of the fact alleged in the second ground. The other motion is for affirmance upon the ground that no assignment of errors was filed with or presented with the bill of exceptions, no assignment of errors was filed in the court below or in this court as required by the rules; there is no assignment of errors in the record; there are no fundamental errors of law or procedure, and no service upon the opposite party of a copy of the directions for making up the record. The transcript of record was filed in this court on January 20, 1920, the day upon which the writ of error was returnable. The assignment of errors was filed the same day. This complies with the statute. See Section 1706, General Statutes, 1906, Florida Compiled Laws, 1914. The certificate of the trial judge shows that "no assignment of errors was presented to or filed with the Judge of the Circuit Court, and said bill of exceptions is signed and certified to, subject to the ruling of the appellate court on the propriety of so doing in the absence of assignment of errors."

Special Rule 1, which is applicable to civil causes, but under Special Rule 6 *may* be used in criminal cases, requires that at the time of presenting a bill of exceptions to the Judge of the Circuit Court to be made up and settled for the appellate court the plaintiff in error shall present with such bill an assignment of errors specifically mentioning each point that he intends to present in and by such bill of exceptions as ground for reversal, etc. The bill of exceptions appears to have been made up under Rule 103, which does not require an assignment of errors to be presented with the bill of exceptions when it is to be authenticated. The two motions are therefore denied.

The first and second assignments of error question the sufficiency of the evidence to support the verdict and the

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conformity of the verdict to the law. The defendant was charged with the manufacture of "alcoholic and intoxicating liquors." The evidence showed that when a Mr. Stow and a Mr. Moody invaded the defendant's house and made a search they found "four gallons of buck." The defendant said he made it for the boys to drink when they came to prime tobacco. Mr. Moody said it was intoxicating, but his cross-examination showed that his statement of fact was a mere impression gained from tasting the liquor. What sensations were produced through his sense of taste to convince his judgment as to the alcoholic or intoxicating properties of the liquor, he did not inform the court or jury.

The evidence was insufficient to establish either the alcoholic or intoxicating properties of the "buck." We also think there was error in denying the motion to strike the testimony of the witness Mr. Morgan, Clerk of the Circuit Court for Gadsden County, who read from "Criminal Docket No. 3" an entry of the judgment of the county court in the case of *State v. Columbus Norwood*, dated May 13, 1917. The allegation in the indictment that the defendant had been theretofore convicted of a like offense was a necessary element in the crime with which he was charged. The whole record of the first judgment of conviction should have been offered. See *Watson v. Jones*, 41 Fla. 241, 25 South. Rep. 678; *Clem v. Meserole*, 44 Fla. 234, 32 South. Rep. 815.

Chapter 4723, Laws of 1899, Section 1522, General Statutes, 1906, Florida Compiled Laws, 1914, does not apply to judgments rendered by County Courts.

For the errors pointed out the judgment is reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Nixon-Smith Con. Co. et al. v. Carlisle—Decision of Court.

NIXON-SMITH CONSTRUCTION COMPANY, A CORPORATION,
AND E. W. JORDAN AND C. J. PHILLIPS, AS COPARTNERS,
DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF
JORDAN & PHILLIPS, *Plaintiffs in Error*, v. P. M. CAR-
LISLE, *Defendant in Error*.

Decision Filed October 25, 1920.

A Writ of Error to a Judgment of the Circuit Court
within and for the County of Bay; C. L. Wilson, Judge.

J. R. Wells, for Plaintiffs in Error;

W. C. Price, for Defendant in Error.

PER CURIAM.—This cause having heretofore been sub-
mitted to the Court upon the transcript of the record of
the judgment aforesaid, and briefs and arguments of
counsel for the respective parties, and the record having
been seen and inspected, and the Court being now advised
of its judgment to be given in the premises, it seems to
the Court that there is no error in the said judgment;
it is, therefore, considered, ordered and adjudged by the
Court that the said judgment of the Circuit Court be,
and the same is hereby, affirmed.

All concur.

Alfred v. Florida Peat Produce Co.—Decision of Court.

R. A. ALFRED, *Plaintiff in Error*, v. FLORIDA PEAT
PRODUCE COMPANY, A DOMESTIC CORPORATION,
Defendant in Error.

Decision Filed October 26, 1920.

A Writ of Error to a Judgment of the Circuit Court
within and for the County of Marion; W. S. Bullock,
Judge.

W. K. Zewadski, for Plaintiff in Error;

L. W. Duval, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court benig now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Guyton v. State of Florida—Syllabus.

TOM GUYTON, *Plaintiff in Error*, v. THE STATE OF FLORIDA,
Defendant in Error.

Opinion Filed October 28, 1920.

1. Evidence of threats by the accused against the class of persons or race to which the deceased belonged are admissible in evidence against the accused upon a trial in which he is charged with the murder of a member of such class or race.
2. Evidence of a physician who examined the body of deceased, stating that his skin was "yellow," with evidence of another witness described as "colored," who was before the jury and who testified that deceased was her father and lived with her, is sufficient proof that the deceased was a negro to render admissible evidence of an alleged threat by plaintiff in error that he was going to "kill me a damn nigger and pay for him."
3. A physician who examined the body of deceased testified that his death resulted from a gun shot wound; that the bullet entered the "left chest" of deceased, passing through his body, "penetrating or cutting part of the heart and the lower part of the lung," causing his death. Another witness testified that plaintiff in error admitted that "he (plaintiff in error) took his gun and killed him (deceased.)" *Held*: that this is sufficient proof of the *corpus delicti* to sustain a verdict of guilty of manslaughter.

A Writ of Error to the Criminal Court of Record for Duval County; J. M. Peeler, Judge.

Judgment affirmed.

A. G. Hartridge and R. E. Stillman, for Plaintiff in Error;

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Van C. Swearingen, Attorney General, and *Worth W. Trammell*, Assistant, for the State.

WEST, J.—Plaintiff in error was indicted upon a charge of murder in the second degree. He was tried and convicted of manslaughter. Motion for new trial was made and denied and sentence to a term of three years at hard labor in the State prison was imposed. From this judgment writ of error was taken.

The first and second assignments of error are considered together. They question the soundness of rulings of the court admitting on behalf of the State and refusing to strike upon motion evidence of alleged threats of plaintiff in error.

A State witness testified that on Sunday before the Friday upon which the homicide occurred she heard plaintiff in error make the following statement: "I heard Guyton call his wife by name; he said, Rosa. She said, What is it dear. She was back in the yard, he was near the gate. When he come near there he stopped the saw; he seen me. He said, Rosa. She said, What is it dear. He said, I got me two barrels of money, and I am going to kill me a dam nigger and pay for him. She said, No darling, I wouldn't do that. He said, Yes I will, that's why I bought this G. D. gun." This evidence was objected to upon the ground that it was immaterial and irrelevant. We think the evidence was material and relevant. In *Dixon v. State*, 13 Fla. 636, this court held that the deceased being a policeman, it was competent to give in evidence on the trial for murder of the accused threats of violence made by him shortly before the killing against "policemen," though not particularly against the person killed. The theory upon which such evidence is

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held admissible is that it tends to show the animus or malice of the accused.

It is held generally that evidence of threats by the accused against the class of persons or race to which the deceased belonged are admissible in evidence against the accused upon a trial in which he is charged with the murder of a member of such class or race. Wharton's Crim. Ev. (10 ed.) §909, p. 1704; Underhill on Crim. Ev. (2 ed.) §328, p. 576; 6 Enc. of Ev. p. 643; Miller v. State, 31 Tex. Crim. Rep. 609, 21 S. W. Rep. 925; People v. Coughlin, 13 Utah 58, 44 Pac. Rep. 94; Anderson v. State, 15 Tex. Ct. of App. Rep. 447; Mathis v. State, 34 Tex. Crim. Rep. 39, 27 S. W. Rep. 817; State v. Gallenough, 89 Minn. 212, 94 N. W. Rep. 723; Harris v. State, 109 Ga. 280, 34 S. E. Rep. 583.

It is insisted here that it was not proved that the deceased was a negro and that therefore the foregoing rule does not apply.

The physician who examined the body of the deceased in describing him stated that his skin was "yellow." A witness described as "colored" testified that the deceased was her father and lived with her. This witness was before the jury. We assume that she was a negro. That the deceased was her father and lived with her was some evidence that he was a negro, sufficient to render admissible evidence of the alleged threat of plaintiff in error that he was going to "kill me a damn nigger and pay for him." There was therefore no error in allowing this evidence to go to the jury.

The only other question presented is the alleged insufficiency of the evidence to support the verdict. Upon this branch of the case it is urged that the *corpus delicti* was not proved.

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The physician who examined the body of deceased testified that his death resulted from a gun shot wound. According to his evidence the bullet entered the "left chest" of deceased, passed through his body "penetrating or cutting part of the heart and the lower part of the lung," causing his death. Another witness testified that plaintiff in error admitted that "he (plaintiff in error, took his gun and killed him (deceased)." This is sufficient proof of the *corpus delicti* to go to the jury. There is other evidence tending to prove the fact of the killing by the plaintiff in error. The evidence is ample to support the verdict of manslaughter.

Finding no reversible error in the record, the judgment is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

MAMIE VARNES, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT FOX, DECEASED, *Plaintiff in Error*, v. SEABOARD AIR LINE RAILWAY COMPANY, A CORPORATION, *Defendant in Error*.

Opinion Filed October 29, 1920.

1. In an action for damages for the wrongful death of one caused by a railroad corporation acting through its special agent, servant or employee, the plea of not guilty does not admit that the person through whose conduct the deceased was killed was the special agent, servant or employee of the defendant, and the burden of proving the relation is upon the plaintiff.

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2. Inducement in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea and which is necessary to elucidate or explain it.
3. Where the evidence will not warrant a verdict for one party to an action, the trial court should direct a verdict for the opposite party.

A Writ of Error to the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Judgment affirmed.

Dickenson & Dickenson, for Plaintiff in Error;

Knight, Thompson & Turner, for Defendant in Error.

ELLIS, J.—This was an action by Mamie Varnes, as administratrix of the estate of Robert Fox, who was her son, against the Seaboard Air Line Railway for damages for his alleged wrongful death. The declaration in three counts alleges in substance that on the night of June 7th, 1917, Robert Fox was a trespasser upon a freight train of the defendant company running between Jacksonville and Tampa; that C. C. Hicks was a special agent or special officer, servant, agent and employee of the defendant charged by it with the special duty and authority of protecting said train from trespassers and preventing the intrusion of trespassers upon the said train, and preventing trespassers from stealing rides or transportation or beating their way upon the said freight train. This is the language of the declaration alleging the relation of Hicks to the railroad company: It alleged that Hicks while acting within the scope of his authority and in the

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capacity of special agent or special officer of the defendant as aforesaid, sought to prevent Fox from riding or beating his way upon the train, and to rid the train of the presence of Fox and to eject him from the train while it was in motion, shot and killed him. The second count alleges that Hicks wantonly and wilfully ejected Fox from the train while it was in rapid motion, causing him to fall to the ground, which caused his death. The third count alleges that Hicks shot and killed Fox to prevent him from re-entering or coming upon the train after Hicks had caused Fox to leave it, and while he was on the ground near the track.

The defendant pleaded not guilty. This was a denial of the defendant's wrongful act. Rule 71, Law Actions.

The defendant's liability for Fox's death existed, if at all, under the doctrine of *respondeat superior*. Therefore the burden rested upon the plaintiff to show that Hicks was a special agent or special officer, servant, agent or employee of the defendant, charged by it with the special duty and authority of protecting that train from trespassers and preventing the intrusion of trespassers upon it, or preventing them from stealing rides or transportation or beating their way on it, and that he killed Fox as alleged while Hicks was acting within the scope of his authority as such special agent.

The parties went to trial upon the issue joined, and on motion of the defendant the court instructed a verdict for the defendant. The verdict was rendered and judgment entered for the defendant. The plaintiff took a writ of error.

There was ample evidence to go to the jury upon the question of whether Hicks killed Fox at the time and un-

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der the circumstances alleged, but there was no evidence whatsoever sufficient to sustain a verdict for the plaintiff upon the theory that Hicks was the agent of the defendant charged with the duty and authority by the defendant of protecting that train, or any train, from trespassers attempting to steal rides or transportation thereon. Upon the other hand, the defendant called a witness named R. S. Moore, who testified that he was the defendant's special agent, with supervision over the territory from Jacksonville to River Junction; that it was his business to employ and discharge officers for that territory covering the point near Marietta, a short distance from Jacksonville, where Fox was killed; that the witness prescribed the duties of persons employed by him; that he employed Hicks in June, 1917, as watchman in West Jacksonville yards, his duties were to protect the merchandise cars in the yard from being broken open and entered; that the point near Marietta where Fox was killed is about two and a half or three miles from the West Jacksonville yards; Hicks' authority ended at the west switch in the West Jacksonville yards; the witness had never given Hicks any orders to go to Marietta, nor employed him to do so, nor was any one in Florida authorized to employ him for the defendant to go there, nor did the witness know of Hicks' ever going there, nor did he ever ratify such act. Hicks was not a special officer of the defendant, merely its watchman; he had no business for the defendant or authority from it on the train; his duties were at the west yards at night as watchman. Hicks had never been sent by the witness on that train, or out on the road from Jacksonville, nor did he have any knowledge of his ever having gone. This watchman was instructed to carry a pistol, but to use it only in self-defense, and when he discovered any one trying to break in a car

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or to steal property, it was his duty to arrest such person and take him before an officer of the law. Hicks' hours as watchman in the yard was from six at night to six in the morning. Under cross-examination it was developed that Hicks had no right even to ride on the train by using his badge as watchman, but was required to show a pass every time he got on a train to ride anywhere, regardless of whether he was known or not, and he had no pass.

But the plaintiff in error contends that the plea of not guilty admits that Hicks was the agent of the defendant as alleged in the declaration. Counsel argue that while the plea "denies the doing of the act complained of," it "admits the capacity in which the party is alleged to have acted." If this statement means that the plea denies that the defendant committed the act complained of, but admits that it committed the act complained of through its agent, the plea of not guilty in such actions is of less significance than a "tinkling cymbal." The plea denies the wrongful act. Rule 71, Law Actions. The wrongful act was alleged to be the killing of Fox by the defendant acting through its agent. To assert that the plea does not deny the agency in such case is to affirm that it has no application when a corporation is defendant, because a corporation can act in no other way than through its agents. The case cited by counsel for plaintiff in error, Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 South. Rep. 377, is not in point. B. P. Coachman sued the railroad company for damage occasioned by the defendant in the negligent transportation of horses and mules belonging to the plaintiff. The consignee was S. S. Coachman, alleged to be plaintiff's agent. The plea of not guilty did not deny that statement because it denied merely the defendant's wrongful act, not that the plaintiff had no right to sue because not the real party in in-

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terest. The case of Atlantic Coast Line R. Co. v. Partidge, 58 Fla. 153, 50 South. Rep. 634, is to the same point, holding that the plea of not guilty did not raise the question of the plaintiff's ownership of the property lost or damaged, such matters should be directly put in issue by special plea. The case of Gainesville & G. R. Co. v. Peck, 55 Fla. 402, 46 South. Rep. 1019, also holds that matter set up in a declaration showing plaintiff's right to *sue* is not denied by the general issue. So in the case at bar the plaintiff alleged that she was administratrix of the estate of Fox, the plea of not guilty did not deny that allegation of agency or representative capacity. The plea of not guilty does not deny the facts stated in the inducement. Rule 71, *supra*, "Inducement in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea and which is necessary to explain or elucidate it." 2 Words and Phrases (2nd ed.) See also 22 Cyc. 498; 12 Stand. Ency. of Proc. 718. Abbott says: Inducement in form is usually somewhat like the preamble in an act or the recitals in a deed and commonly commences with the word *whereas*. In torts all that part of the declaration which precedes in logical order the statement of the act which is complained of as wrongful, comprising the allegation of the right or the circumstances of the right, is commonly known as the inducement. 1 Abbott's Law Dictionary, 601.

There was no evidence to show that the man Hicks was the agent of the defendant to protect the train from trespassers or the intrusion of trespassers upon it, or from stealing rides on it, nor that in shooting Fox he was acting within the scope of his authority as an employee, nor with the apparent scope of his authority. The theory of *respondeat superior* was the only one upon

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which the declaration could be held to state a cause of action and it was wholly unsupported by the evidence. The court therefore correctly directed a verdict for the defendant, because the evidence would not have warranted a verdict for the plaintiff. See *Mugge v. Jackson*, 53 Fla. 323, 43 South. Rep. 91; *Rogers Co. v. Meinhardt Bros.*, 37 Fla. 480, 19 South. Rep. 878; Sec. 1496, Gen. Stats. of Florida, 1906, Compiled Laws, 1914.

In this case actionable wrong could not be imputed to defendant under the evidence; the court therefore as a matter of law correctly determined the issue in favor of the defendant. See *Southern Exp. Co. v. Williamson*, 66 Fla. 286, 63 South. Rep. 433.

The judgment is therefore affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

W. H. BETHEA, *Plaintiff in Error*, v. D. B. HOUCK,
Defendant in Error.

Opinion Filed October 30, 1920.

Where the allegations of a declaration state the essentials of a cause of action and the exhibits to the declaration in effect sustain the allegations, a demurrer to the declaration should be overruled.

A Writ of Error to the Circuit Court for Taylor County; M. F. Horne, Judge.

Judgment reversed.

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Wm. T. Hendry, for Plaintiff in Error;

W. B. Davis, for Defendant in Error.

WHITFIELD, J.—The declaration herein is as follows:

"The plaintiff, W. H. Bethea, by his undersigned attorney, sues the defendant, D. B. Houck, in an action of covenant damages \$500.00 for that heretofore, to-wit: On the 19th day of June, 1918, plaintiff purchased from defendant all of the cattle owned by defendant, together with defendant's farm and other properties, the exact number of the cattle at the time of the purchase being uncertain, but which defendant guaranteed to be not less than thirty-five head; and for all of said properties plaintiff agreed to pay to the defendant the sum of \$5,450.00; that the defendant, joined by his wife, then and there made, executed and delivered to plaintiff a certain bond for title and contract of sale, by which defendant covenanted to convey and transfer and deliver all of the said properties as therein described upon the payment of said sum of \$5,450.00, evidenced by plaintiff's promissory note payable December 1st, 1918, a copy of said bond for title being hereto attached and made a part hereof as much so as if set out in full herein, marked 'Exhibit A.'

"Plaintiff alleges that thereafter he paid said note and the defendant then and there became obligated to transfer and deliver all of said cattle, which said cattle were then and there forty in number.

"Plaintiff alleges that defendant has failed to transfer and deliver twelve of said cattle, which said twelve head of cattle were then and there of the value of \$30.00 per head and of the total value of \$360.00; that plaintiff

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paid the said promissory note, so given for the purchase price of said cattle on the 2nd day of December, 1918, and the defendant became obligated to deliver all of said forty head of cattle to the plaintiff; that by reason of defendant's breach of his said bond for title and contract of sale by failure to deliver said twelve head of cattle, plaintiff has been deprived of the use, benefit and value thereof. Wherefore plaintiff sues and claims Five Hundred Dollars damages."

"Exhibit A" is as follows:

"STATE OF FLORIDA,

"TAYLOR COUNTY.

"KNOW ALL MEN BY THESE PRESENTS. That D. B. Houck and Minnie Houck, of the County of Taylor, State of Florida, held and firmly bound unto W. H. Bethea or his heirs, of the County of Taylor, State of Florida, in the sum of (\$5,450.00) Five Thousand Four Hundred Fifty Dollars, for the payment whereof well and truly to be made to bind D. B. Houck, heirs, executors and administrators of D. B. Houck firmly by these presents.

"Signed and sealed this 19th day of June, A. D. 1918.

"THE CONDITION of the above obligation is such that whereas the said D. B. Houck and Minnie Houck has this day bargained and sold to the said W. H. Bethea the following described property, lying and being in the County of Taylor and State of Florida: S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. (16) and NW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sect. (21) and S $\frac{1}{2}$ & S $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. (15), all in Township (5) & Range (8) East, containing 480. A sugar mill & kettle and all the goats of 23 head now belonging to the place and on the

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range, and corn to the amount of 200 bbls. and 35 head of cattle branded with D on the range maybe more cattle and 7 or 8 head of sheep. Cows marked swallow fork & under bit & crop under cross nick in the other. If there is not 35 head of cattle the said D. B. Houck agrees to deduct \$30.00 per head off for all shortage in cattle to W. H. Bethea.

"And in consideration thereof, the said W. H. Bethea executed a certain promissory note of even date herewith, payable Dec. 1st, 1918.

"NOW, IF THE SAID, W. H. Bethea shall well and truly pay the said promissory note as stated therein, into the possession of which, from the date hereof, it is hereby agreed that he shall enter and continue, then the said D. B. Houck and Minnie Houck shall execute a deed in fee simple to the said property described for the aforesaid property, when this obligation is to be void, else to remain in full force and virtue.

"D. B. HOUCK. (Seal)
her

"MINNIE X HOUCK. (Seal)
mark

"Signed, sealed and delivered in presence of:

"Robert O. Sellers.

"A. E. Jackson."

A demurrer to the declaration was sustained and final judgment for defendant was rendered on the demurrer. Writ of error was taken by the plaintiff.

The "bond for title" covers "35 head of cattle branded with D on the range, maybe more cattle," and covenants that "if there is not 35 head of cattle the said D. B. Houck agrees to deduct \$30.00 per head off for all

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shortage in cattle to W. H. Bethea." The declaration alleges the payment of the entire consideration and that the cattle referred to in the covenant "were then and there forty in number" and the "defendant has failed to transfer and deliver twelve of said cattle."

If as alleged the cattle sold were "forty in number" and the "defendant has failed to transfer and deliver twelve of said cattle," a cause of action is stated, since the allegations are consistent with the provisions of the bond.

The failure of the plaintiff to deduct from his payment the value of the cattle sold but not delivered, does not deprive the plaintiff of his right of action.

Of course the proofs must conform to the allegations that are sustained by the terms of the bond.

Judgment reversed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

NAT RICHARDSON, *Plaintiff in Error*, v. THE STATE OF
FLORIDA, *Defendant in Error*.

Opinion Filed October 30, 1920.

1. Evidence of dying declarations is admissible only in cases where the declarant has abandoned all hope of recovery from the injury received at the hands of the accused, and is convinced that his death is inevitable and near at hand. But in passing upon the question of whether the declarant was in such mental state at the time of making the declaration as

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to render it admissible under the foregoing test, resort may be had to all the circumstances of the case and expressed utterances are not essential.

2. Whether a sufficient and proper predicate has been laid for the admission in evidence of dying declarations is a primary matter for determination by the trial court, being a mixed question of law and fact, and the judgment of such court thereon is entitled to great weight, every presumption being in favor of its correctness, but such ruling is subject to review by an appellate court, though it will not be disturbed, unless it clearly appear to be erroneous.
3. Premeditated design to effect death is an essential element of the crime of murder in the first degree, and where the evidence offered is insufficient to establish this element of the crime a judgment upon a verdict finding the defendant guilty of murder in the first degree will be reversed.

A Writ of Error to the Circuit Court for Putnam County; James T. Wills, Judge.

Reversed.

J. V. Walton, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WEST, J.—Plaintiff in error, referred to in this opinion as defendant, was indicted on a charge of murder in the first degree. He was found guilty as charged and sentenced to be hanged. Motion for a new trial was denied. Writ of error was taken from the judgment imposing sentence and the case is here for consideration by this court.

The first assignment of error challenges a ruling of the trial court admitting in evidence over objection of

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defendant a written statement purporting to be a dying declaration of deceased. This statement is as follows:

“State of Florida, County of Duval,
“Jacksonville.

“I, Ray Butts, realizing that I am about to die, and that it is impossible for me to recover, and being conscious of my condition, and in the very article of death, do make this my dying declaration and state the following to be the truth, the whole truth and nothing but the truth. I started back to the cab and met negro on cab steps I asked him what he wanted and he started to draw his pistol from his bosom I then drew my pistol and shot twice before he fired, his first shot struck me either in the face or shoulder I don't know which after I fell he shot me in the buttox. I had been warned that two negroes were on my train, and they were dangerous and to be careful. That is the reason I did not take any chance and shot first.

“Witnesses

J. E. Butts

O. K. Robinson

Geo. E. Welch.

his
Ray X Butts
mark

“Subscribed and sworn to before me a Notary Public this 28th day of September, A. D. 1919.

“FRANK P. BEDDOW,

“Notary Public, State of Florida.

“My commission expires July 6th, 1920.

“(Notarial Seal)”

The contention made in support of this assignment is that no sufficient predicate had been established for the admission in evidence of a dying declaration.

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Evidence of dying declarations is admissible only in cases where the declarant has abandoned all hope of recovery from the injury received at the hands of the accused and is convinced that his death is inevitable and near at hand. But in passing upon the question of whether the declarant was in such mental state at the time of making the declaration as to render it admissible under the foregoing test, resort may be had to all the circumstances of the case and expressed utterances are not essential. *Copeland v. State*, 58 Fla. 26, 50 South. Rep. 26; *Lester v. State*, 37 Fla. 382, 20 South. Rep. 232; *Richard v. State*, 42 Fla. 528, 29 South. Rep. 413.

The deceased, who was a train conductor, was shot by the defendant in Palatka, and was taken from Palatka to Jacksonville, where he died on the following day from the wounds received. Dr. Pittman, one of the physicians who treated deceased, and operated upon him in an effort to save his life, as a witness in behalf of the State, described the wounds upon his body and his condition at the time. From the evidence of this witness it appeared that the bladder and intestines of the deceased were pierced by a ball from the pistol of defendant with which deceased was wounded, and that at the time of the operation, which was performed soon after he reached Jacksonville on the same day that he was wounded, his "abdomen was full of blood from internal hemorrhage." This witness was present at the time the dying declaration offered in evidence was made. He testified that deceased "was suffering pain, but fully conscious at the time the statement was made and absolutely understood what he was doing."

The deputy sheriff who obtained the dying declaration, as a witness for the State, testified that he "wrote the

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statement and read it over to Mr. Butts (the deceased) and he swore to it in the presence of a notary public." On cross-examination this witness said: "I wrote the statement just as Mr. Butts told me, and then read it to him and asked him if that was exactly as it was. He dictated it and I wrote it just as he told me. Dr. Pittman, a physician at St. Luke's Hospital, Mr. Beddow, a Notary Public, Mr. Robinson, Dr. Welch, and the nurse getting ready to administer the ether, were present. They held it up a few minutes. Mr. Butts knew he was going to be operated on."

The notary public before whom the declaration was sworn to, as a witness for the State, testified that he heard the deceased when he dictated the statement to be written and heard it read to him, that deceased could not sign it because of the wound in his hand, "but he held the pen."

Upon this showing the statement set out above was offered and admitted in evidence. In *Malone v. State*, 72 Fla. 28, 72 South. Rep. 415, this court said: "Whether a sufficient and proper predicate has been laid for the admission in evidence of dying declarations is a primary matter for determination by the trial court, being a mixed question of law and fact, and the judgment of such court thereon is entitled to great weight, every presumption being in favor of its correctness, but such ruling is subject to review by an appellate court, though it will not be disturbed, unless it clearly appear to be erroneous." *Lowman et al. v. State*, 80 Fla. —, 85 South. Rep. 166, and cases cited.

The statement offered contained the essential requirements of the preliminary showing necessary to make it admissible as a dying declaration. It had been shown

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that deceased was "fully conscious" at the time he made the statement and absolutely understood what he was doing; that it was dictated by him, read to him after being written, and was sworn to before an officer. There was therefore no error in admitting it at that time.

When the State had rested Dr. Pittman was recalled by the defendant for further cross-examination. At that time he testified as follows: "Mr. Butts understood that he was to be operated upon. We told him the operation was a serious one; that his condition was serious and he understood that he was in a serious condition. I do not think anything was said to him about the success of the operation; that we did not know what the ultimate result of the operation might be; gave him to understand that he would better make the statement before the operation, as he might not survive the operation. I do not know that he had abandoned hope of recovery at the time of making the statement. I do not know whether he had or not."

Dr. Welch, a physician who attended deceased at Palatka and accompanied him to the hospital in Jacksonville, was called as a witness for defendant. Upon the point under consideration he testified as follows: "I was present when the dying declaration was made in Jacksonville and I signed it as a subscribing witness. I do not recall whether Conductor Butts dictated the whole of that declaration or not. At the time he started to make his declaration I was in there, but I did not know I was going to have any part in it at all. Several were present. The Deputy Sheriff came in and asked him to make a statement. He talked with Dr. Pittman first—getting permission to obtain this statement—and I heard nothing that was said to Mr. Butts prior to his making the

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statement. The first thing that attracted my attention is that Butts stated that he shot the negro first—that was the first time I heard that he had shot the negro first and that is all that I paid any particular attention to. I do not know whether Mr. Butts was informed that he was going to die. I went to Jacksonville with Conductor Butts. Well, I think hope was held out to him as to the outcome of the operation—that hope was held out. Whether he was told at that time by the doctors present I do not know.”

When this testimony had been given counsel for defendant moved the court to strike the dying declaration which had been received in evidence upon the ground that it appeared that all hope of recovery had not been abandoned by deceased at the time the declaration was made. There was no error in the denial of this motion. The quoted evidence contains nothing sufficient to overcome the positive assertion of the deceased to the effect that he realized the impossibility of his recovery. In fact, considering all the circumstances of the case, this evidence seems to us to tend to strengthen rather than weaken the preliminary proof necessary as a predicate to the admissibility of the dying declaration, which was a part of the statement itself.

The deputy sheriff who took the statement of the deceased was recalled by the defendant for further cross examination. Upon this examination he testified that the portion of the statement showing the state of mind of the deceased and consciousness of impending death was his (witness') composition; that he did not suppose the deceased “would know about that part of it,” but stated again at this time “that the whole thing was read to him.”

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There was no motion to strike the dying declaration after this testimony was given.

It is clear, as we have seen, that there was no abuse of discretion or error in admitting the dying declaration in the first instance on the showing then made, nor in denying the motion to strike it which was subsequently made, and, while no motion was made after the last recited testimony had been introduced to then test the question of the admissibility of the dying declaration, in view of the sentence of death imposed upon the defendant we have carefully examined the question, and in the light of all that has been said herein conclude that there was no error in permitting the jury to consider the dying declaration with all the other evidence in the case in making up their verdict. Although deceased did not dictate the preliminary part of the statement before it was written, it appears that at the time it was signed by him he was in the full possession of his mental faculties, was apprised of its contents before he signed it, and was "fully conscious" of what the statement contained and of what he was doing. The shooting of deceased by defendant was not denied. It was admitted by defendant himself. Other witnesses who were near by at the time of the shooting testified at the trial of the case. The only purpose served by the dying declaration was to supply some details of the encounter not covered by the testimony of other witnesses.

The refusal of the trial judge to give a requested instruction to the jury on the law of self defense is assigned as error. This subject was fully covered in an instruction given and it is not error to refuse to give requested instructions when the point is covered by instructions given.

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One of the grounds of the motion for a new trial is that the verdict is contrary to the evidence. Premeditated design to effect death is an essential element of the crime of murder in the first degree. The circumstances attending the shooting of deceased by defendant are stated in the declaration of the deceased, which we have held admissible. Meeting the defendant deceased shot twice at him before defendant fired. Defendant drew his gun, fired immediately at deceased, mortally wounding him. There is no evidence of other facts or circumstances in the record sufficient to show the existence of a premeditated design to kill by defendant or from which such design may be legitimately inferred. In the absence of such proof the offense alleged in the indictment is not proved. The case is to be tried again and we will therefore not discuss the evidence.

There is error in the order overruling defendant's motion for a new trial and the judgment must be reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J., specially concurring.

BROWNE, C. J., specially concurring.

I concur in the conclusion and in the opinion, except as it finds no reversible error in the admission as a dying declaration of the statement of the wounded man, part of which was composed by a deputy sheriff and part taken down as dictated by the deceased.

The introductory recital in the wounded man's declaration, that "I Ray Butts realizing that I am about to die, and that it is impossible for me to recover, and being apprised of my condition, and in the very article of death

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do make this my dying declaration and state the following to be the truth the whole truth and nothing but the truth," taken by itself and unexplained or contradicted by other evidence, might be sufficient to make the declaration admissible. There is uncontradicted testimony that the deceased did not know "that his death was imminent and inevitable and that he entertained no hope whatever of recovery," as is required in this State as a preliminary foundation to make such declarations admissible. *Lester v. State*, 37 Fla. 383, 20 South. Rep. 232.

This preliminary, vital and essential part of the declaration was composed and written by a deputy sheriff, and taken to where the injured man was being prepared to undergo an operation in the hope of saving his life, after which he took down the rest of the statement, and then read the whole of it to him. The purpose of reading it to the deceased was that he might know before signing that his words had been correctly transcribed, and in that frame of mind the declarant would not be apt to give special care and attention to the preliminary part, but would fix his faculties upon the part that he had dictated.

The deputy sheriff who composed the essential part of the declaration testified: "*I didn't suppose he would know about that part of it.*" "The rest of it" (meaning the dying declaration) "was his." If the statement of how the shooting occurred was all of the declaration that "was his" that part wherein he is made to say that he realizes that he is "about to die and that it is impossible for me to recover" is not "his." The attending physicians did not know that it was impossible for the

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wounded man to recover at the time he made this statement. How then could the wounded man know it?

Dr. Pittman, a witness for the State, testified: "Mr. Butts understood that he was to be operated upon. We told him the operation was a serious one; that his condition was serious and he understood that he was in a serious condition. I do not think anything was said to him about the success of the operation; that we did not know what the ultimate result of the operation might be; gave him to understand that he would better make the statement before the operation as he *might not* survive the operation. *I do not know that he had abandoned hope of recovery at the time of making the statement.* I do not know whether he had or not. I always endeavor to build up the spirits as much as I can (meaning the spirits of patients about to go under operation) and probably did in this instance."

Dr. Welch testified: "I think hope was held out to him as to the outcome of the operation—that hope was held out" and "I did not know that Mr. Butts could not live. We know of cases as severely wounded as that that have lived—nevertheless his chance was very small."

The physicians who performed the operation must have felt that there was a chance of the wounded man's recovery else they would not have performed an operation on him. We cannot conceive of reputable physicians—such as those who were in attendance upon the wounded man—cutting up a person if they knew there was no possible chance of his recovery. If they did not know it, the wounded man did not know it. The very fact that an operation was to be performed upon him necessarily caused him to believe that there was a chance of recovery. The doctors did not know—the wounded

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man did not know—that “*every hope* of this world was gone.” Dixon v. State, 13 Fla. 636.

I cannot conceive of a person “fully conscious”—as one witness says the wounded man was—submitting to anaesthesia, and consenting to be mutilated—nor can I conceive of reputable physicians doing such a thing—if they and he “knew” that “*every hope* of this world was gone,” and that death was imminent and impending. It is not the belief of the certainty of death, that makes dying declarations admissible. All mankind knows of its “certainty.” The knowledge that it is imminent and impending, and that “*every hope* of this world had gone” is what is essential to make dying declarations admissible. The fact that he consented to the operation—the fact that the doctors were willing to and did operate on him—is an absolute negative to any belief on his or their part of the absolute inevitableness of death, and that it was imminent and impending.

I think the declaration was improperly admitted in evidence.

TAYLOR, J., Concurring.

I concur in the judgment of reversal in this case. But there is another, to my mind, serious question as to the admissibility of the *ante mortem* statement of the deceased *as a whole*. This statement winds up with the following sentences: “I had been warned that two negroes were on my train and they were dangerous, and to be careful.” “That is the reason I did not take any chances and shot first.” This so-called warning to the deceased

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of the fact that two negroes were on his train who were dangerous characters, that had a strong tendency to injuriously affect the defendant in his trial, was the veriest hearsay, that had no proper place as a part of the *ante mortem* statement of the deceased, and the fact of its being made a part of a dying declaration does not add anything to its admissibility in evidence, or change its character in the least as legally prohibited hearsay. While I greatly doubt the admissibility of any part of this dying declaration because of the unsatisfactory proofs of the predicate for its admission, yet upon another trial of the case I do not think that the last two above quoted sentences of said written dying declaration should be permitted to go to the jury. I think also that the evidence fails to establish the requisite premeditated design.

W. F. DAVIS, *Plaintiff in Error*, v. E. R. RAVENEL, *Defendant in Error*.

Decision Filed October 30, 1920.

A writ of error to a judgment of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

Richard D. Morales, G. H. Cornelius and W. D. Davis, for Plaintiff in Error.

John B. Sutton, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of

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the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

M. H. BYRD, *Appellant*, v. HATTIE BYRD, *Appellee*.

Decision Filed November 1, 1920.

An Appeal from an order of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

Mabry & Carlton and *William L. Pencke*, for Appellant;

Jackson & Withers, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

The Gulf Trading Co. v. Campbell et al.—Decision of Court.

JOHN BRAND, *Appellant*, v. L. G. NORTON, *Appellee*.

Decision Filed November 3, 1920.

An Appeal from an order of the Circuit Court within and for the County of Dade; H. Pierre Branning, Judge.

Shutts & Bowen, for Appellant;

McCaskill & McCaskill, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

THE GULF TRADING COMPANY, A CORPORATION, *Plaintiff in Error*, v. CHARLES CAMPBELL *et al.*, *Defendants in Error*.

Decision Filed November 3, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Franklin; E. C. Love, Judge.

Thomas et al. v. Hayter—Syllabus.

R. Don McLeod, Jr., for Plaintiff in Error;

W. J. Owen, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

IDA TAYLOR THOMAS AND HENRY THOMAS, HER HUSBAND,
Plaintiffs in Error, v. MARY E. HAYTER, *Defendant in Error*.

Opinion Filed November 3, 1920.

Where the evidence, though conflicting, affords a sufficient legal basis for a verdict, and no material or harmful errors of law or procedure appear, the judgment will be affirmed.

A Writ of Error to the Circuit Court for Duval County;
Daniel A. Simmons, Judge.

Judgment affirmed.

McGill & McGill, for Plaintiffs in Error;

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Fred B. Noble, Noble & Sawyer and Frank E. Jennings,
for Defendant in Error.

WHITFIELD, J.—In an action of ejectment brought by Mary E. Hayter against Ida Taylor Thomas and Henry Thomas, her husband, to recover Lot Three (3), Block Thirty-six (36), Dotens Subdivision of the City of Jacksonville, Florida, trial was had on a plea of not guilty. Plaintiff adduced a quit-claim deed from Chas. W. Kinne and wife dated June 14, 1918, and also presented testimony to show that the defendants had acknowledged that their possession of the property was subordinate to and in recognition of the ownership of it by Chas. W. Kinne after a master's deed in foreclosure proceedings had been executed to Kinne and before Kinne quit-claimed to the plaintiff. The bill of exceptions contains the following:

“The plaintiff duly proved that Emma Castellano and Stephen Castellano, her husband, executed a mortgage on the property involved in this suit to H. J. Hayter on January 11, 1909, which was duly recorded in the public records of Duval County, Florida, on January 12th, 1909; that this mortgage was foreclosed in the Circuit Court, Duval County, Florida, in chancery, in a suit in which the bill of complaint was filed on the 21st day of January, 1914. That the defendants in this cause and all other necessary parties were made defendants in the foreclosure proceedings and all were duly and regularly served with process; that these defendants in this cause appeared in the suit and filed an answer by their attorney, J. M. Peeler, Esq.; that a final decree was rendered in the foreclosure proceedings in which it was adjudged and decreed that the equities were with the complainant and

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that all the defendants in said suit, and that all persons claiming by, through or under them since the commencement of the suit, be forever barred and foreclosed from all equity of redemption and claim of, in and to the mortgaged premises or any part thereof; that, on a sale of the mortgaged premises, the same were purchased by Chas. W. Kinne, to whom a master's deed was issued, dated December 19th, 1914, and recorded in Deed Book No. 132, page 605, of the public records of Duval County, Florida, on the 8th day of January, 1915; that the said sale was confirmed by the court."

A motion to direct a verdict for the defendants was denied; and defendants adduced testimony to show that they had not recognized Kinne as their landlord and that they claimed by purchase from another party, though no paper title was adduced and no title by adverse possession was clearly shown.

A writ of error was taken to a judgment for the plaintiff, and the contention here is "that the verdict is not sustained by a preponderance of the evidence and is contrary thereto."

Conflicts in the testimony as to the character of the defendant's possession of the *locus in quo* were settled by the jury. The other facts established in the bill of exceptions and the conclusion of the jury as to disputed facts are a sufficient predicate for the verdict and judgment rendered thereon; and as no material or harmful errors of law or of procedure appear, the judgment is affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

McCrary Co et al. v. Dade County, Fla.—Syllabus.

THE J. B. MCCRARY COMPANY AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Plaintiffs in Error*, v. DADE COUNTY, FLORIDA, FOR THE USE AND BENEFIT OF E. I. DUPONT DE NEMOURS & COMPANY, A CORPORATION, *Defendant in Error*.

Opinion Filed November 3, 1920.

1. In an action by a material man on a bond given by a contractor to the county under the provisions of Chapter 6867, Laws of 1915, who has entered into a contract for the construction of public works, neither the plea of "never was indebted" nor the plea of "never promised" is applicable where the materials alleged to have been furnished by the material man were supplied to a subcontractor.
2. Chapter 6867, Laws of 1915, requiring that all bonds taken by the State or county for the performance of a contract for the construction of any public work shall contain a provision that the contractor or contractors shall promptly make payments to all persons supplying him or them any labor or material, and further providing that suit may be brought in the name of the obligee in the bond for the use and benefit of any person, firm or corporation who shall have furnished any labor or material in the prosecution of the said work against the contractor and sureties on the bond to recover the amount due such person, firm or corporation on account of labor or materials so furnished, applies in a case where labor or materials is furnished to a sub-contractor, and in such case suit may be maintained against the contractor and sureties on the bond to recover the value of the labor and materials so furnished.
3. The right of action provided by the statute in behalf of any person, firm or corporation supplying labor or material to a contractor or sub-contractor engaged in the construction of public works is secured only when a bond of the contractor is filed containing the additional obligations required by the statute that the contractor or contractors shall promptly

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make payment to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract.

4. A bond filed by a contractor who has assumed a contract for the construction of public works, which does not contain such obligation, but does contain a condition that he will carry out all the terms of the contract, and such contract contains a clause that the contractor will pay all just claims for materials and supplies that might be incurred by him in the performance of the work, is not such a bond as is required by the statute to protect third persons from whom the contractor or sub-contractor may obtain materials or labor, and no right of action is secured to such persons against the contractor and his sureties thereby.

A Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Order reversed.

Shutts, Smith & Bowen, of Miami, *Little, Powell, Smith & Goldstein* and *Arthur G. Powell*, of Atlanta, Ga., for Plaintiffs in Error;

A. J. Rose, for Defendant in Error.

ELLIS, J.—In June, 1918, E. I. DuPont de Nemours & Company, a corporation, brought an action in the Circuit Court for Dade County, in the name of the county, against the J. B. McCrary Company, a corporation, Hartford Accident and Insurance Company and J. F. Morgan and E. E. Hill as partners doing business as J. F. Morgan and Company, to recover the price and value of certain materials furnished by E. I. DuPont de Nemours & Company to J. F. Morgan and Company and used in building a certain road in Dade County. The action was

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upon the bond and contract made and entered into by J. B. McCrary Company with the Hartford Accident and Insurance Company as surety on the bond, for the construction of the road, it being alleged that McCrary and Company had sublet the contract to Morgan and Company.

The allegations of the declaration in substance are that Dade County entered into a written contract with The J. B. McCrary Company in May, 1916, for the construction by the latter of a public highway in Special Road and Bridge District No. 2 in Dade County, a description of the road being "set forth in the specifications and profile referred to in the contracts as exhibits 'B and C' and made a part of said contract." That under the terms of the contract the J. B. McCrary Company agreed to "furnish all material and other supplies needed, or to be needed in the construction of the road, set forth in said contract and specifications heretofore referred to, and it further covenanted and agreed, among other things, that it would well and truly and promptly pay all just claims for materials and supplies that it might be incurred by said contractor in the performance of said work" to protect and save harmless the said Board and Special Road and Bridge District against all claims for materials and supplies due to any person by reason of "said contractor having been let the contract for the building and construction of said road," and to execute a surety bond satisfactory to said Board in the sum of one hundred and twenty thousand, seven hundred fifty dollars within eight days after signing the contract, and to fully comply with, abide by and perform all the terms, and conditions set forth in the contract, a certified copy of which was attached to the declaration as a part of it and marked Exhibit "A." The amount to be paid by

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the county to the contractor under the contract was \$241,500.00.

It was also alleged that on May 26th, 1916, the contractor, J. B. McCrary Company, executed the bond with Hartford Accident and Indemnity Company as surety in pursuance of the contract, the condition of the bond being that the contractor "should well and truly perform, carry out and abide by *all* the terms and conditions of said contract, specifications and profile hereinbefore referred to," etc. A copy of the bond was also attached to the declaration, made a part of it and marked Exhibit "B." It was alleged that the contractor, J. B. McCrary Company, afterwards sublet the contract to J. F. Morgan and Company, who entered upon the construction of the work and agreed with J. B. McCrary Company to carry out the contract and construct the road for the McCrary Company; that the "plaintiff" at the request of J. F. Morgan and Company supplied them with certain material "necessary for the construction and prosecution of said public highway," etc.; that the materials were valued at \$5,047.50, and that the "said J. F. Morgan and Co. and The J. B. McCrary Company accepted the said supplies and material so furnished and provided by the plaintiff." That the contract between the county and McCrary Company is not yet fully performed, that the said claim for material is a "just claim," that no part of it has been paid except five hundred dollars, and the remainder is due and unpaid. That the plaintiff made the affidavit required by Chapter 6867, Laws of Florida, and procured from the Clerk of the Board of County Commissioners of Dade County, Florida, certified copies of the original contract and bond.

The second, third and fourth counts of the declaration

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are common counts for goods bargained and sold, for work done and materials furnished and account stated.

Chapter 6867, Laws of 1915, is as follows:

“AN ACT to Provide That in All Bonds Taken by the State of Florida, any County of said State, or any City in said State, or any Political Subdivision Thereof, or Other Public Authority, for the Performance of a Contract for the Construction of any Public Building or the Prosecution and Completion of any Public Work, or for Repairs Upon any Public Building or Public Work, there shall be a Provision that the Contractor or Contractors shall Promptly Make Payments to all Persons supplying him or them Labor and Material in the Prosecution of the work; and, further Providing that Suit may be brought in the Name of the Obligee in said Bond for the Use and Benefit of any Person, Firm or Corporation, who shall have furnished any Labor or Material, in the prosecution of said work against the Contractor and the Sureties on said Bond to recover the Amount due such Person, Firm, or Corporation, on Account of the Labor, or Materials, so furnished.

“Be It Enacted by the Legislature of the State of Florida:

“Section 1. That, hereafter, any person, or persons, entering into a formal contract with the State of Florida, any county of said State, or any city in said State, or any political subdivision thereof, or other public authority, for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building, or public work, shall be required, before commencing such work, to execute the

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usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor, or contractors, shall promptly make payments to all persons supplying him, or them, labor and material in the prosecution of the work provided for in such contract; and any person, or persons, making application therefor, and furnishing affidavit to the Treasurer of the said State of Florida, or any City, or County, or political subdivisions, or other public authority, having charge of said work, that labor or materials for the prosecution of such work has been supplied by him, or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which, said person, or persons, supplying such labor and materials, shall have a right of action, and shall be authorized to bring suit in the name of the State of Florida, or the City, County, or political subdivision, prosecuting said work for his, or their, use and benefit, against said contractor, and sureties, and to prosecute the same to final judgment and execution; Provided that such action, and its prosecution, shall not involve the State of Florida, any County, City or other political subdivision, in any expense.

“Approved June 5, 1915.”

The condition and obligations of the bond were as follows:

“The condition of the above and foregoing obligation is such, that, whereas, the J. B. McCrary Company has entered into a contract with the Board of County Commissioners of Dade County, Florida, for the furnishing of all labor, materials and supplies and the construction of a road in Special Road and Bridge District No. 2 of Dade County, Florida, said road being more particularly de-

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scribed in said contract, specifications and profile, and being known as 'The Miami-Marco part of the Tamiami Trail,' in accordance with the terms and conditions set forth in said contract, specifications and profile hereto attached, which said contract specifications and profile are marked respectively Exhibits 'A,' 'B,' and 'C' and made part of this bond as fully and completely as though said contract, specifications and profile were fully set forth in this bond.

"Now, therefore, if the said principal, The J. B. McCrary Company, a Corporation as aforesaid, shall well and truly perform, carry out and abide by all of the terms and conditions of said contract, specifications and profile hereinbefore referred to, and build and complete said road in accordance with the terms and conditions of said contract and specifications hereinbefore referred to, and in a manner satisfactory to the Board of County Commissioners of Dade County, Florida, then this obligation to be void, else to remain in full force, virtue and effect."

The defendants J. B. McCrary Company and Hartford Accident and Indemnity Company moved the court to require the plaintiff to amend its declaration by alleging whether it seeks to recover in an action of assumpsit or covenant upon the indebtedness against J. F. Morgan & Company, or upon the bond described in the declaration. They also moved to strike the first count upon the ground that it declares upon an instrument under seal in covenant whereas the praecipe and summons recite that they were issued in assumpsit. They also demurred to the first count upon the grounds that it stated no cause of action against them; that it showed no right in the plaintiff to recover against them on account of the indebtedness due by J. F. Morgan & Company; that it is vague

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and indefinite in that it does not appear whether the plaintiff seeks to recover on the land or upon the debt due by J. F. Morgan & Company; that the allegations are contradictory and inconsistent; there is a misjoinder of parties; it is duplicitous and multifarious and it declares in covenant while the action was assumpsit as shown by the praecipe and summons.

J. F. Morgan & Company demurred to the declaration upon the grounds that the action could not be maintained against them, that they were improperly joined; there was no privity between Dade County and them; that under the facts alleged the provisions of Chapter 6867 are not applicable to them; that they were not contractors with Dade County within the meaning of Chapter 6867; they were not parties to the bond; that the second, third and fourth counts of the declaration show a variance between the Exhibit "C" and the said counts and are repugnant to it, and for misjoinder of parties.

In October, 1918, the court ordered the names of J. F. Morgan and E. E. Hill, partners as J. F. Morgan & Company, to be stricken from the declaration as partners, and permitted the plaintiffs to amend in accordance with the order. On the same day the demurrer of McCrary & Company and the Hartford Company was overruled, the motion for compelling an amendment denied, as was also the motion to strike the first count. The plaintiffs were allowed to amend the praecipe and summons to conform to the action as developed in the first count. The defendants pleaded the general issue to the second, third and fourth counts, and "never promised as alleged" and "never was indebted as alleged" to the first count. There was also a third plea to the first count on "equitable grounds" in which the defendants admitted making the contract for

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constructing the road and the execution of the bond; it averred that thereafter McCrary & Company contracted with J. F. Morgan and Company for the construction of the road, a copy of the contract being attached to the plea; that the bond given by J. B. McCrary and Company with the Hartford Company as surety referred to in the declaration did not contain the additional obligation provided by Chapter 6867 so as to require McCrary and Company to make payments to all persons supplying labor and material in prosecution of the work, nor did the contract between McCrary and Company and Dade County require the defendant, McCrary and Company, or its surety to pay the bills of subcontractors for supplies.

The plaintiffs moved to strike the third plea of defendant upon the ground that it presented no defense which in equity would be good ground for relief against a judgment at law. This motion was granted and the plaintiffs joined issue upon all the remaining pleas and the parties went to trial.

By stipulation between the parties the execution of the documents referred to in the declaration as Exhibits "A" and "B" were admitted. When offered in evidence the defendants objected to the introduction in evidence of Exhibit "A" upon the ground that the contract created no liability against J. B. McCrary Company, upon which the action sued upon could be based. This objection was overruled. Objection was also made to the introduction in evidence of Exhibit "B" upon the ground that it was immaterial; that the conditions of the bond and contract did not support the allegations of the declaration and because the conditions of the bond were not sufficient to support the action against J. B. McCrary Company. This objection was also overruled and the two documents admitted in evidence. The defendants duly excepted.

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Depositions of J. F. Morgan were read in evidence. Objections to the issuing of the commission were made by defendants, also to the reading in evidence of the depositions upon the ground that the witness was before the court. These objections were overruled and the depositions read. The execution of the contract between J. F. Morgan and Company and J. B. McCrory Company was established by this witness and read in evidence over defendants' objection, also Morgan and Company's acknowledgment of their debt to the plaintiff, E. I. DuPont de Nemours & Company, by letter, which was duly objected to by defendants. The defendants moved the court to direct a verdict for them, but the motion was denied.

Upon motion of the plaintiffs the court directed a verdict for them, a motion for a new trial was denied and judgment entered for the plaintiffs.

The act referred to above requires that the contractor should execute the "usual penal bond" with the "additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract."

The bond sued upon contains no such condition nor obligation. The supplies were not furnished to the contractor J. B. McCrory Company, the obligor, but to J. F. Morgan and Company, a partnership which had undertaken the work under a contract with J. B. McCrory Company and who had not executed the bond sued upon, nor were they parties to the action.

No attempt was made to prove a case under the common counts. The evidence was not applicable to them, nor was the action based upon any theory that could sup-

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port such counts against the defendant McCrary Company and its surety.

The pleas to the first count which were “never promised” and “never was indebted,” were inapplicable to an action on the bond given by a contractor to the county for the construction of public works where the material alleged to have been furnished was supplied to a sub-contractor. The declaration showed upon its face that there was no privity between the plaintiff for whose benefit the action was brought and the defendant McCrary Company’s liability if any existed, rested not upon its relation to the sub-contractor nor to the county, but upon the bond which it was claimed held McCrary Company to “make payments to all persons supplying him or them (contractor or contractors) labor and material in the prosecution of the work,” etc. The bond was the foundation of the action not merely the inducement. The pleas therefore were not responsive, they were immaterial. Whether true or false they did not affect the rights of either party if they were intended to relate to the alleged debt due to the plaintiffs, and they were not applicable to a declaration in debt on bond. The plaintiff could have ignored them and taken a default. If the jury had found for the defendant the plaintiff would have been entitled to its verdict *non obstante* in so far as the rights of the parties depended on these pleas. See *Huling v. Florida Savings Bank*, 19 Fla. 695.

No assignment of error based upon any incident or transaction occurring during the trial would be considered because the plaintiff being entitled to a default all the material allegations of fact in the declaration were admitted, and the only question was one of damages or amount of the plaintiff’s claim. Upon this the defend-

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ants were heard and no assignment of error is based upon that phase of the case.

If the defendants desired to test the existence of the debt alleged to be due by Morgan and Company to the plaintiffs, the non-payment of which was assigned as the breach in the action on the bond, they may have done so by an appropriate special plea; but a plea in such an action as this that the defendants were not indebted to the plaintiffs was immaterial. It was not the McCrary Company's indebtedness to the plaintiff, but Morgan and Company's indebtedness to the plaintiff that gave them under the peculiar circumstances of this case, so they claim, their right to bring the action on the bond.

The only question presented therefore by the record is whether the demurrer interposed by McCrary Company and its surety to the declaration should have been overruled.

The plaintiffs in error contend that the provisions of the act do not extend to material, men and laborers supplying material and labor to sub-contractors, not only because they are not expressly included within the terms of the act, but if they were, the act would then be broader than its title and therefore unconstitutional.

Section 16 of Article III of the Constitution provides that each law enacted by the Legislature shall embrace but "one subject and matter properly connected therewith." It also provides that the "*subject shall be briefly expressed in the title,*" etc.

The subject of the Act is the protection of persons who may supply labor or material for the construction of public works. The title of the Act was not formulated

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evidently in view of the constitutional admonition that the *subject* of the Act should be *briefly* stated in the title. The scope of the Act, however, is not narrowed by the unnecessary verbiage of its title, although the real purpose of the Act is almost smothered by it. The real purpose of the Act is shown by the following words in the title, which appear under the overburden of many lines, *viz.*: "Providing that suit may be brought in the name of the obligee in said bond for the use and benefit of any person, firm or corporation who shall have furnished any labor or material in the prosecution of said work," etc. This purpose grows out of the fact that a laborer or material man who furnishes labor or material for the construction of any public work can have no lien upon the work as is provided for under the mechanics and laborers lien statutes upon private property. So provision was made for such persons by the Act. Public works of much consequence are usually prosecuted under contract. The material men and laborers rarely, if ever, in such case come in contact or have any relation with the State, county or city officials, their material is furnished or the labor supplied at the request of some one, whether as an individual or as the representative of some corporation engaged in prosecuting the public work.

There is no conceivable objection to this method of securing the payment for material and labor furnished in the prosecution of any public work. No hardship is imposed upon either the contractor or his surety. They know before the contract and bond are executed that any person supplying labor or material in the prosecution of the work is intended to be protected by the bond. If any part of the work is sublet or the contractor assigns his contract, it is an easy matter for him to take security from the sub-contractor that all obligations for labor and

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material shall be paid. To place the construction upon the act contended for by plaintiffs in error would be to narrow its beneficent purpose and destroy in a large measure the expressed purpose of the Act. The Act in question was copied from the Act of Congress of August 13, 1894, 28 Stats. at Large 278, Chap 280 U. S. Comp. Stats. 1901, p. 2523, and at the time of its passage the Act of Congress had been construed to embrace within its provisions all persons furnishing labor or material in the construction of public works, whether directly to the contractor or to the sub-contractor. See *United States for the benefit of Hill v. American Surety Company of New York*, 200 U. S. 197, 26 Sup. Ct. Rep. 168, 50 L. Ed. 437. See also *French v. Powell*, 135 Cal. 636, 68 Pac. Rep. 92; *Mann v. Corrigan*, 28 Kan. 194.

Counsel argue with much cleverness that the words "him or them" which appear in the statute refer only to the "contractor or contractors" and not to sub-contractors, and that the provisions of the Act are expressly limited to material men and laborers supplying the original contractor with material or labor. That the Supreme Court of the United State in the case of *Hill v. American Surety Company*, *supra*, brought to these words appearing in the Act the broadening purpose expressed in the title of the Federal Act and eliminated the words "him or them" from the Act practically. That as the title to the Florida Act contains the words "him or them" the purpose of the Legislature is thus shown to limit the provisions of the Act to persons supplying the contractor with material or labor. The words "him or them" as they appear both in the title and body of the Act relate to the provision required to be inserted in the bond to be given by the contractor. A provision shall be inserted in the bond that the "contractor or contrac-

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tors shall promptly make payments to all persons supplying him or them labor and material." The Supreme Court of the United States points out that the contractor gets the benefit of the completed work whether he completes it himself or through a sub-contractor, and the labor and material supplied to his sub-contractor is as effectually supplied to him as if he had directly hired the labor or bought the material.

Counsel for plaintiffs in error contend that the bond does not contain the statutory condition and obligation, therefore the right to bring the action did not exist. We agree with them in this position. The right of action is secured only when a bond of the contractor is filed which contains the "*additional obligations*" that such "contractor or contractors shall promptly make payment to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract." The right to recover on such bond arises when the debt incurred by the contractor or contractors, whether original or sub-contractors, for material and labor in the prosecution of the public work is due and has not been paid.

The "ordinary penal bond," that is the ordinary bond for the faithful execution of the contract according to its terms is all the protection needed for the State, county or city, but the additional obligation named is required to be included in such bond in order that the protection of the material man and laborer may be secured.

MR. JUSTICE BROWN, speaking for the court in United States Fidelity & Guaranty Co. v. Golden Pressed & Fire Brick Co., 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142, said that the covenant is inserted for an entirely different purpose from that of securing to the govern-

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ment the performance of the contract. In that covenant the surety guarantees nothing to the principal obligee, the government. In that case the bond given by the contractor was conditioned not only upon the faithful performance of his work to erect the building according to his contract and to any changes or additions made thereto, but to "promptly make payments to all persons supplying him labor or material in the prosecution of the work contemplated by said contract."

Counsel for defendants in error contend that as the contract contained a clause that J. B. McCrary Company would "promptly pay all just claims for material, labor, supplies, equipment and damages, including any claim for personal injury that may be incurred by said contractor in the performance of said work and all damages that may be occasioned to any person, persons or corporation by reason of negligence of said contractor or its agents, servants or employees, and does hereby covenant and agree to protect and save harmless the said Board and Special Road and Bridge District No. 2 of Dade County, Florida, against all claims for material, labor, damages and supplies due any person, persons, firms or corporations by reason of said contractor having been let the contract for the building and construction of said road." And as the contract was made a part of the bond by its terms, that the statute was in substance complied with and the right of action upon the bond against McCrary Company and its surety secured to all persons supplying material and labor. But the covenant in the bond was to perform and carry out and abide by all the terms and conditions of the contract, etc., and build and complete the road in accordance with the terms and conditions of said contract, etc. In the case of *Mankin v. United States to Use of Ludowici-Celadon Co.*, 215 U. S.

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533, 54 L. Ed. 315, 30 Sup. Ct. Rep. 174, the bond contained the statutory covenant. So in *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452, 54 L. Ed. 1107, 31 Sup. Ct. Rep. 49, and in *Title Guaranty & Trust Co. of Scranton, Pa. v. Crane Co.*, 219 U. S. 24, 55 L. Ed. 73, 31 Sup. Ct. Rep. 140, and in *United States Fidelity & Guaranty Co. v. United States for benefit of Bartlett*, 231 U. S. 237, 58 L. Ed. 200, 34 Sup. Ct. Rep. 88, and in *Equitable Surety Co. v. United States to Use of W. McMillan & Son*, 234 U. S. 448, 58 L. Ed. 1394, 34 Sup. Ct. Rep. 803.

In the latter case MR. JUSTICE PITNEY, quoting from the case of *United States v. National Surety Co.*, 92 Fed. Rep. 549, as follows: "The obligation has a dual aspect, it being given in the first place to secure to the government the faithful performance of all obligations which a contractor may assume toward it; and in the second place to protect third persons from whom the contractor may obtain materials or labor; and that these two agreements are as distinct as if contained in separate instruments," said: that the construction given to the Act in the 92 Fed. is correct. "The object of the legislation was to give legal sanction to the 'additional obligation' that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the contract, and to give such a laborer or material man a right to bring an action if necessary on the bond."

A surety's obligation is strictly construed and will not be extended by implication to conditions not clearly within the terms of the undertaking. There is no question but that both contract and bond were executed for the benefit of the county and not for the benefit of ma-

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terial men and laborers who might supply material and labor for the work. The condition of the bond secured the performance of the contract; this condition was for the benefit of the county, there was no privity between third persons and the county, nor between them and defendants, the rights of the material men and laborers depended entirely upon the statute and its provisions were ignored in the drafting of the bond. See *Searles v. City of Flora*, 225 Ill. 167, 80 N. E. Rep. 98; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529, 78 Pac. Rep. 1106; *Scott-Graff Lumber Co. v. Independent School Dist. No. 1*, 112 Minn. 474, 128 N. W. Rep. 672; *Brown Bros. v. Columbia Irr. Dist.*, 82 Wash. 274, 144 Pac. Rep. 74; *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. Rep. 756.

The order overruling the demurrer to the declaration was error, so the judgment is reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

WHITFIELD, J., Concurring:

The persons to whom and the defaults for which a surety may be liable on a contract of suretyship are determined by the principles of the common law or by the provisions of statute law that are applicable to the terms of the particular contract. Where the common law does not give a right of action against the surety to persons who are not parties to a surety bond and where a statute expressly requires such a bond to contain stated provisions, which, when so incorporated, under the statute give third persons rights of action against the surety, but such statutory provision is not in form or in substance made a part

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of the bond, a holding that third parties have a right of action and of recovery against the *surety* is not authorized and may be a violation of the organic right to due process of law.

The statute not only provides that any person or persons entering into a formal contract with public authorities for the construction, completion or repair of any public building or work "shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor, shall promptly make payments to all persons supplying him or them labor or material in the prosecution of the work," but the statute also expressly provides that any person or persons furnishing labor or material shall have a right of action and recovery against the contractor and his sureties for unpaid amounts due for labor and material used in the public work. This statute, when complied with by the execution of a bond conditioned as is expressly required, is properly held to give a right of action and recovery to those who furnish labor and material to the sub-contractor as well as the contractor, since the right of action as specifically given removes the ambiguity in the preceding provision of the statute.

While the statute expressly makes it the duty of the public authorities to require the contractor to execute a bond "with good and sufficient sureties" conditioned as prescribed, yet the statute imposes on the sureties no duty as to the execution of the bond, and the failure of the officials to do their duty is not chargeable to the sureties. And the statute does not impose on the sureties the "additional obligations" stated in the statute unless the statutory conditions are made a part of the bond.

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Where a particular statutory obligation to pay, that is dependent upon specific conditions, is to be relied on, care should be taken to see that the conditions on which the statutory liability rests, have been complied with before credits are extended.

In this case the condition of the bond does not contain the "additional obligations" in the statutory form so as to impose a liability to third persons not parties to the bond; but the express condition is that the McCrary Company "shall well and truly perform and carry out and abide by all of the terms and conditions of said contract" made a part of the bond. The contract contains a covenant that the McCrary Company, the contractor, will "promptly pay all just claims for material, labor, supplies, equipment and damages * that may be incurred *by said contractor* in the performance of said work." This quoted language of the bond and the contract cannot fairly be held to be equivalent to the express statutory provision which imposes a liability on the surety in the bond, on which the statute specifically gives a right of action to third persons not parties to the bond, where the statutory provision is incorporated in the bond. The obligation of the surety in this case cannot legally be extended beyond the liability imposed by the terms of the bond under the principles of the common law; and the common law liability of the surety does not extend to the real plaintiff here. The statutory obligation cannot legally be imposed upon the surety because the statutory provision was not in substance or in effect incorporated in the bond as required by the statute, and the statute does not impose the added liability unless the required provision is made a part of the bond. Even if the bond as executed imposes a liability in favor of those who furnished labor or material to the *contractor*, it certainly is not so conditioned

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under the common law as to give a right of action to those who furnished labor or material to *sub-contractors*; and the statutory obligation imposing such a liability was not assumed by the sureties.

PERRY HAMBRICK, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed November 8, 1920.

1. "When the record in a criminal case shows fully the crime for which the prisoner was indicted and all the proceedings thereon, through trial and verdict up to conviction and sentence, the failure in the sentence to name the crime for which the prisoner is sentenced may be supplied by reference to the rest of the record."
2. The entire record may be looked to in ascertaining the offense for which an accused is sentenced, and an erroneous recital or statement of the offense by the court in pronouncing sentence, or of the clerk in recording the judgment imposed in the minutes of the proceedings kept by him, will not vitiate the judgment when the record fully discloses the offense for which the accused was indicted, tried and convicted.

A Writ of Error to the Circuit Court for Bay County;
C. L. Wilson, Judge.

Affirmed.

E. Dykes, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

Hambrick v. State of Florida—Opinion of Court.

West, J.—Plaintiff in error was tried and convicted upon a charge of having carnal intercourse with an unmarried female person of previous chaste character under the age of eighteen years. Motion for new trial was denied. Sentence was imposed and to this judgment writ of error was taken from this court.

The first assignment of error raises the question of the sufficiency of the evidence to support the verdict. To recite the evidence in this opinion would be of no benefit. It is, we think, ample to support the verdict and there is nothing in the record to indicate that the jury was influenced by any consideration outside the evidence.

The judgment imposing sentence was as follows: "The prisoner being led to the bar in custody was asked by the court if he had anything to say why the sentence of the law should not be pronounced against him, and he saying nothing in bar or preclusion thereof the judge pronounced the following judgment and sentence. You having been convicted of the crime of having carnal intercourse with an unmarried female under the age of eighteen years, the Court adjudges you to be guilty. It is the judgment of the court and the sentence of the law that you, Perry Hambrick, for your said crime do be confined at hard labor in the State prison for the term of three years."

It is contended that this judgment is void and in support of this contention it is said that the sentence was imposed under Section 3521, General Statutes of Florida, Florida Compiled Laws Section 3521, which section was repealed by Chapter 7782, Laws of Florida, Special Session 1918. There is nothing in the record to indicate this except the omission of the words "of previous chaste character" from the recital by the trial judge of the offense of

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which plaintiff in error had been found guilty by the verdict of the jury and upon which the court was then about to pronounce the sentence of the law.

The offense denounced by Chapter 7732 was sufficiently alleged in the indictment and was fully proved by the evidence upon the trial of the case. The verdict found the defendant "guilty as charged," and the judgment refers to the offense for the punishment of which sentence was imposed as "your said crime."

The recital by the trial court, in which the omission occurred, is not an essential part of the judgment. *Mathis et al. v. State*, 67 Fla. 277, 64 South. Rep. 944. The record clearly shows the offense for which plaintiff in error was on trial and of which he was duly convicted.

In *Pointer v. United States*, 151 U. S. 396, it was urged that the sentence imposed was defective in that it did not state the offense of which the defendant was found guilty. The opinion in that case recites that the record disclosed an indictment duly returned by a grand jury charging the defendant with the crime of murder, his arraignment and plea of not guilty upon the indictment, his trial and a verdict of guilty of murder as charged in one of the counts of the indictment. It was held that when the defendant was brought into court and asked if he had anything to say why the sentence of the law upon the verdict theretofore returned against him in said cause should not be pronounced, there could be no doubt as to the offense of which he was found guilty and on account of which he was sentenced to suffer the penalty of death. In dealing with the question the court held that "when the record in a criminal case shows fully the crime for which the prisoner was indicted and all the proceedings thereon,

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through trial and verdict up to conviction and sentence, the failure in the sentence to name the crime for which the prisoner is sentenced may be supplied by reference to the rest of the record." See also *Ex Parte Gibson*, 31 Cal. Rep. 619; *State v. Cook*, 92 Ia. 483, 61 N. W. Rep. 185; *People ex rel. Hutchinson v. Murphy*, 188 Ill. 984, 58 N. E. Rep. 984.

In the case under consideration the record shows that plaintiff in error was indicted, tried and convicted on a charge predicated upon Chapter 7732, Laws of Florida, special session 1918, and it is apparent from the record that the judgment was imposed pursuant to the conviction of the offense charged in the indictment against him.

The entire record may be looked to in ascertaining the offense for which the accused is sentenced, and an erroneous recital or statement of the offense by the court in pronouncing sentence, or of the clerk in recording in the minutes of the proceedings kept by him the judgment imposed, will not vitiate the judgment when the record fully discloses the offense for which the accused was indicted, tried and convicted. In such case the record furnishes a complete protection against another prosecution for the same offense. 16 C. J. 1322; *State v. DeHart*, 109 Ia. 570, 33 South. Rep. 605; *Johnson v. State*, 106 Miss. 94, 63 South. Rep. 338; *People v. Terrill*, 133 Cal. 120, 65 Pac. Rep. 303; *Ira Cole v. The People*, 37 Mich. 544.

The judgment is therefore affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

McAllister v. McMichael—Decision of Court

EMMA C. MCALLISTER, A WIDOW, *Appellant*, v. J. M. McMICHAEL, *Appellee*.

Decision Filed November 8, 1920.

Petition for Rehearing Denied December 16, 1920.

An Appeal from an Order of the Circuit Court within and for the County of Dade; H. Pierre Branning, Judge.

W. L. Freeland, for Appellant;

Hudson Wolfe & Cason, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the Order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

On Petition for Rehearing.

PER CURIAM.—The orders herein appealed from were affirmed without opinion. A petition for rehearing has been filed. The bill of complaint as amended states a ground for relief which is not affected by the nature of the allegations challenged by the special demurrers. Whether

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there is anything due the complainant for which he may have a lien on the property of defendant cannot be determined on the demurrers.

It is quite improper for counsel to address letters to members of the court discussing the merits of an application for a rehearing in a cause.

Rehearing denied.

All concur.

ADAM SILCOX, *Plaintiff in Error*, v. ELBERT O. CORSA,
Defendant in Error.

Opinion Filed November 8, 1920.

1. In an action at law where the plaintiff seeks to recover for services rendered by him, he is not entitled to recover therefor in the absence of any evidence as to the value of such services.
2. Where a verdict in plaintiff's favor is wholly unsupported by the evidence offered, it is the duty of the court to set it aside upon motion, and a failure to do so is error for which the judgment thereon will be reversed.

A Writ of Error to the Circuit Court for DeSoto County; John S. Edwards, Judge.

Reversed.

W. C. Langford, Hilton S. Hampton and S. S. Sandford, for Plaintiff in Error;

Leitner & Leitner, for Defendant in Error.

Silcox v. Corsa—Opinion of Court.

West, J.—In an action of assumpsit plaintiff, who is defendant in error here, sued the defendant, plaintiff in error here, to recover for the value of certain services alleged to have been rendered by plaintiff for defendant. The declaration contains only the common counts. The plea to the declaration making the issue upon which the case was tried is never was indebted as alleged. Upon a trial of this issue verdict was rendered and judgment entered for the plaintiff. Motion for new trial was denied.

The only question presented here is the sufficiency of the evidence to support the verdict. No attempt was made to prove the allegations of any except the count for work done and materials furnished by the plaintiff for the defendant. With respect to the proof under this count plaintiff, as a witness, testified in his own behalf that there was no contract or agreement between him and defendant as to the amount which he was to receive for the work performed by him. That he did perform some service for defendant is undisputed, but in the absence of proof of the reasonable value of such service plaintiff is not entitled to recover, and there is not in this record such evidence of the reasonable value of the service alleged to have been rendered as may be made a basis for the verdict. *Dickerson et al. v. Langford*, 69 Fla. 127, 67 South. Rep. 807; *C. H. & N. R. Co. v. Burwell & Hillyer*, 56 Fla. 217, 48 South. Rep. 213.

The motion for a new trial should have been granted and for the error in overruling it the judgment must be reversed.

Reversed.

BROWNE, C. J. AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Agin et al. v. G. P. and C. Co.—Syllabus.

MARY BELL AGIN AND HARRY AGIN, HER HUSBAND, *Appellants*, v. GAINESVILLE PLANING AND COFFIN COMPANY, A CORPORATION, *Appellees*.

Opinion Filed November 11, 1920.

1. The complainant in a suit in equity who seeks to subject a lot which is a married woman's separate statutory property, to the payment of claims of the complainant as a material man who is alleged to have furnished such material to a contractor who erected a building upon the married woman's property must show knowledge upon the part of the married woman that the material was being furnished by the complainant and used by the contractor and that she assented to such furnishing by complainant and use of the material upon the conditions alleged.
2. Section 2 of Article XI of the Constitution of Florida, which provides, among other things, that a married woman's separate real or personal property may be charged in equity and sold, etc., for "labor and material used with her knowledge or assent in the construction of buildings or repairs or improvements upon the property," etc., removes from the married woman under certain restrictions, the common law disability of coverture, and to enable her to assume obligations that can be charged in equity upon and enforced out of her separate property.
3. Mechanics and material men's liens provided for under Sections 2189a to 2211, Florida Compiled Laws, 1914, do not apply to the separate property of married women.

An Appeal from the Circuit Court for Alachua County;
James T. Wills, Judge.

Decree reversed.

Agin et al. v. G. P. and C. Co.—Opinion of Court.

E. G. Baxter and Robert E. Davis, for Appellants;

W. S. Broome, for Appellee.

ELLIS, J.—This was a suit in equity brought by the Gainesville Planing and Coffin Company against Mary Bell Agin and her husband, Harry Agin, to subject a certain lot of land in Waldo, Florida, and the house located on the said lot to the payment of a certain claim of the complainant for lumber and material furnished in the construction of the house. There was a decree for the plaintiff, and the defendants appealed.

The bill prays that a lien be declared upon the land and house in favor of the complainant for the lumber and material furnished, that if the defendant, Mary Bell Agin, fails to pay the amount due for the lumber and material that the rents and profits of the property be sequestered, or that the lands and tenements described in the bill be sold to pay the debt due for the materials furnished by complainant in the construction of the house.

The bill alleges that the described lot was the separate statutory property of Mary Bell Agin, that Harry Agin acting as her agent caused the building to be erected, that he entered into a contract with one W. P. Whelpley, a contractor, for the construction of the building, that the complainant furnished the material to Whelpley and gave notice of the fact to Harry Agin, and that he and his wife at the time of receiving such notice owed the contractor an amount in excess of the indebtedness due to the complainant.

The answer of Mary Bell Agin neither admitted nor denied her ownership of the property, it denied that she caused the building to be erected and that her husband

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acted as her agent, but averred that he on his own account caused the building to be erected and for that purpose contracted with Whelpley to erect it, the latter to furnish all material and labor for a certain sum of money to be paid by Harry Agin. That the complainant sold the materials to Whelpley directly and not as agent for the defendant, nor for her use and benefit. That when Harry Agin received the notice from complainant that it had furnished material to Whelpley he paid to the latter a sufficient sum of money to pay the debt claimed and for the express purpose of paying it, that complainant received the money, but credited a different account of Whelpley's. The answer of Harry Agin was substantially the same.

There was no evidence as to the ownership of the property, but the complainant must obtain relief, if at all, upon the case made by its bill, and that case is one in which the separate statutory property of a married woman is sought to be charged with a material man's lien when the material man was not in privity with the owner, or a case in which the separate statutory property of a married woman is sought to be subjected in equity independent of the statutory liens upon her contract for its improvement.

No relief could be granted upon the latter phase of the case, because the evidence shows, and it is uncontradicted, that Harry Agin made a contract for a stated amount with W. P. Whelpley, a contractor, and builder, for the erection of the building upon the lot described; that the materials were sold by complainant to Whelpley and delivered to him upon his own account and that he was not Mrs. Agin's agent; that she had no contract, agreement or understanding directly or indirectly with the complainant for the purchase of the material, nor

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that either she or her husband assumed liability therefor. There is, therefore, no basis in equity for relief against Mrs. Agin upon the theory that her statutory property may be subjected in equity to the payment of obligations incurred by her for its betterment. See *Macfarlane v. Southern Lumber & Supply Co.*, 47 Fla. 271, 30 South. Rep. 1029.

Section 2 of Article XI, Constitution of 1885, provides, among other things, that a married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof sequestrated * * * for "labor and material used with her knowledge or assent in the construction of buildings or repairs or improvements upon her property," etc. The purpose of this provision of the organic law is to remove from married women under carefully limited restrictions the common law disability of coverture in the case specified, and in such cases to enable her to assume obligations that can be charged in equity upon and enforced out of her separate property. See *Micou v. McDonald*, 55 Fla. 776, 46 South. Rep. 291; *McGill v. Art Stone Const. Co.*, 57 Fla. 498, 49 South. Rep. 539; *McMillan v. Warren*, 59 Fla. 578, 52 South. Rep. 825. One of the restrictions upon the assumption of such obligations by married women is knowledge on her part that the material is being furnished and that she has assented to it upon the conditions upon which it is being supplied. This much of the elements of a contract is essential to her assent which must be directly or indirectly given. The cases above cited which hold that her separate property may be sequestrated or sold in equity to pay for materials which she or her husband as her agent purchase for use in construction of a building upon her property is in accord with the principle that her obligation results from a contract with

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reference to her separate property, but to hold it may be sold to satisfy a claim for materials in favor of one with whom there is or was no privity of contract with the owner is to ignore the restriction that the material must be furnished with her knowledge or assent.

No relief could be granted upon the other phase of the case, that is to say that a lien was created by statute in favor of the complainant, because the mechanics and material men's liens provided for by Sections 2189a to 2211, Florida Compiled Laws, 1914, do not apply to the separate property of married women. See *Smith v. Gauby*, 43 Fla. 142, 30 South. Rep. 683; *Macfarlane v. Southern Lumber & Supply Co.*, *supra*; *DeSoto Nat. Bank v. Arcadia Electric Light, Ice & Telephone Co.*, 57 Fla. 391, 48 South. Rep. 745, and same case reported in 59 Fla. 479, 52 South. Rep. 612. Counsel for appellee admits in his brief that it was never intended to claim a material man's lien against the property, but that it was intended to get whatever benefit may be derived from giving actual notice of his client's rights. If Whelpley owed the complainant for material which the former used in constructing the house on Mrs. Agin's land, what right did that give the complainant to subject Mrs. Agin's land to the payment of Whelpley's debt? The case of *Thomas Co. v. Daugherty*, 68 Fla. 305, 67 South. Rep. 105, does not support the appellee's contention that notice to the married woman that the material man is furnishing material to her creditor for the building that is being erected is sufficient to charge her property. In that case the material man's bill was dismissed on final hearing, and the decree was affirmed. The court in its opinion said that the appellant did not clearly show that any conduct on the part of the married woman misled the complainant, or

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that by implication she had knowledge of or did assent to the purchase of the material in question from the complainant, that she had no contractual relation with the complainant, did not purchase the material and did not know of or assent to the use of it in the erection of the house. In this case while she had no contractual relation with the complainant, did not purchase the material and did nothing to mislead the complainant, and had no knowledge of and did not assent to the purchase of the material, it is nevertheless contended that because her husband received a notice from complainant that it had sold to Whelpley lumber and building material for "construction and use" in building the house, and later that Whelpley had not paid and later still, on Oct. 2, 1913, that the account amounted to \$427.65, Mrs. Agin's separate property, is subject in equity to be sold in payment of the bill. There was due to Whelpley when the first notice was received about eight or nine hundred dollars. The house was completed the last of October or the first of November, 1913. That is not the meaning of the term "with her knowledge or assent," as used in Section 2 of Article XI of the Constitution. Any person knows that in constructing a building both material and labor are used, and when a married woman lets a contract for such work she knows that materials are to be purchased and labor employed, and, of course, she assents thereto. She may even have knowledge that her contractor is purchasing material from a certain material man and employing certain persons as laborers, but as between her and such persons there is no privity, and she is not by any statute required to assume the obligation incurred by her contractor. She has in this State only the power to make a contract of a particular character, but the mechanics' lien law provides for a personal judgment against the owner,

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yet does not give to the married woman the power to make a contract upon which to base the judgment. See *O'Neil v. Percival*, 20 Fla. 937. Subsequent acts make no change in this respect from the one considered in the *Percival* case.

The decree of the Chancellor is reversed with directions to dismiss the bill.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J., concur.

THE COMMERCIAL BANK OF OCALA, A CORPORATION, *Appellant*, v. THE FIRST NATIONAL BANK OF GAINESVILLE, A CORPORATION, *Appellee*.

Opinion Filed November 22, 1920.

Petition for Rehearing Denied March 15, 1921.

1. All the points adjudicated by an appellate court upon an appeal become the law of the case and are no longer open for discussion or consideration.
2. Where there is competent testimony to support the finding of a chancellor the decree will not be reversed on the evidence where, though conflicting, it is sufficient to support such finding.
3. A deficiency decree in a mortgage foreclosure suit is a decree for the balance of the indebtedness after applying the proceeds of a sale of the mortgaged property to such indebtedness.

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4. Where, in a suit brought for the foreclosure of a mortgage, there is a cross-bill to foreclose a senior mortgage upon a portion of the same property which cross-bill contains a prayer for a "deficiency" decree against a party defendant in said suit who is a former owner of such senior mortgage and the indebtedness secured thereby, for moneys received by such former owner in part payment of such indebtedness, but not applied thereon, which he has no right to retain, the word "deficiency" being inapt may be disregarded and a decree entered in accordance with such prayer.

An Appeal from the Circuit Court for Marion County;
W. S. Bullock, Judge.

Affirmed.

H. M. Hampton, for Appellant;

Hampton & Hampton and *Hooker & Martin*, for Appellees.

WEST, J.—For a proper disposition of this appeal the issues presented are sufficiently stated in the opinion filed when the case was here on the former appeal (*Commercial Bank of Ocala v. First National Bank of Gainesville*, 75 Fla. 634, 79 South. Rep. 446). After that decision the case was remanded to the court below, where further proceedings were had. Testimony was taken and a final decree rendered, from which this appeal was taken. The law of the case was settled when the case was here before. Questions arising subsequently are largely of facts which are complicated, about which there is dispute, and upon which there is conflict in the evidence. There is evidence to support the conclusions reached, and under the settled doctrine that a decree will not be reversed on the evidence when the testimony is

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conflicting but sufficient to support the findings of the chancellor, these questions are not open for consideration here and a discussion of them would be of no benefit. *Phinney v. Phinney*, 77 Fla. 850, 82 South. Rep. 357; *Millinor v. Thornhill*, 63 Fla. 531, 58 South. Rep. 34; *Sheppard v. Crowley*, 61 Fla. 735, 55 South. Rep. 841.

In the final decree the court found in substance that the appellant, the Commercial Bank of Ocala, had received certain moneys as payments on the indebtedness represented by the note which was transferred by it to the First National Bank of Gainesville, the cross-complainant and one of the appellees here; that such payments were received prior to the transfer but did not appear as payments or credits upon the note as transferred and delivered to the Gainesville Bank; that the Gainesville Bank had no knowledge of such payments at the time of the receipt of the note but accepted and paid for it the amount for which it was originally given less certain credits appearing on the note, and judgment was awarded by the decree against the Ocala Bank in favor of the Gainesville Bank for the aggregate sum of the amounts so received by the Ocala Bank as payments on the note prior to its transfer.

The only question deemed necessary to be considered at this time is the contention that appellant was simply the endorser of the note sued on by the cross-complainant, the Gainesville Bank, and that under the law a deficiency decree against the endorser of the note cannot be taken. *Snell et al v. Richardson*, 67 Fla. 386, 65 South Rep. 592. This contention cannot be upheld. The fallacy in the argument is that it assumes a situation not presented by the record. In the former opinion we said: "By the original suit it is proposed to redeem and pay to the com-

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plainant in the cross-bill the amount due upon the note and mortgage owned by it, which is a superior lien to the mortgage being foreclosed, such amount to be ascertained upon an accounting by the maker of such note and mortgage, the mortgagee, who is the appellant herein and the present owner of the note and mortgage, the appellee, all of whom are made defendants in such suit. The legal effect of appellee's contention is to say that if the note and mortgage which it owns is to be redeemed and cancelled, it (the appellee) should be protected by the decree of the court, and that if it should be found upon the accounting prayed for in both the original bill and the cross-bill that the appellant herein, who is a defendant in the original suit and against whom an accounting is prayed has received moneys which were intended as payments upon such indebtedness, and should have been credited thereon, but were not so credited, the appellee should have a decree against him for the amount so received."

The obligation of the appellant does not, strictly speaking, grow out of its endorsement of the note. It is true that the appellee Gainesville Bank acquired the note and the mortgage given to secure the payment of the indebtedness represented by it by a transfer from appellant. But when the appellee Gainesville Bank is required by a redemption of this note and mortgage at the suit of the holder of a junior mortgage to surrender them up for cancellation upon payment of less than appears due thereon and less than it in good faith paid therefor and it is shown that appellant had prior to the transfer received moneys as payments on the indebtedness, which moneys it has no legal right to retain and which other parties in interest who are parties to the suit have a right to require it to properly apply in payment of the

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indebtedness, a judgment against it for the amount so received and retained is not, technically speaking, a deficiency decree.

A deficiency decree is one for the balance of the indebtedness after applying the proceeds of a sale of the mortgaged property to such indebtedness. 27 Cyc. 1746; Jones on Mortgages, 7 ed. §1709a; Bailey et al v. Block et al, 104 Tex. 101, 134 S. W. Rep. 323; Patrick et al v. National Bank of Commerce, 63 Neb. 200, 88 N. W. Rep. 183. Nothing of that kind is presented by this record.

The prayer in the cross-bill for a deficiency decree does not change the nature of the transaction, and the word "deficiency" as there employed being inapt, may be rejected as surplusage.

The obligation of appellant rests upon a duty to account for moneys had and received which in equity and good conscience belong to another and which it has no right to retain, and, as was held in the original opinion, a court of equity having taken jurisdiction of the cause and all the parties in interest being made parties thereto, it will proceed with a determination of all the matters properly presented.

The decree will be affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
CONCUR.

Williams v. Hines—Syllabus.

HENRY WILLIAMS, *Plaintiff in Error*, v. WALKER D. HINES,
AS DIRECTOR GENERAL OF RAILROADS, *Defendant in Error*.

Opinion Filed November 22, 1920.

1. Where the common law rule prevails, unmodified by statute, the weight of authority supports the holding that in an action against a principal, or master, and his agent, or servant, for damages resulting solely from the negligence of the agent, or servant, acting as such, a verdict of the jury exonerating the agent, or servant, exonerates the principal or master. They are in no sense joint tort feorsors, but the basis of the liability of the principal, or master, is the well-known doctrine of *respondeat superior*.
2. Under the pleadings and the evidence in the case at bar, Sections 3148 and 3149 of the General Statutes of Florida of 1906, do not change this rule.
3. In a case brought against the Director General of Railroads, operating a railroad in the State of Florida, and a locomotive engineer, the servant of such Director General, for damages for injuries resulting to the plaintiff solely because of the negligence of such engineer in the operation of a train which is alleged to have run into the train the plaintiff was entering, no recovery can be had for other negligence than that alleged in the declaration.
4. A plaintiff is confined to the cause of action alleged in his declaration and cannot recover for any other act, or acts, of negligence than the act, or acts, alleged, and there is no presumption of negligence against one operating a railroad other than as to the act, or acts, of negligence alleged.
5. Where a jury by its verdict in an action for damages for injuries sustained brought against a master and his servant jointly, recovery thereof being based solely upon the negligent act of the servant, exonerates such servant, but finds

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the master guilty, such verdict as to such master is erroneous, and should be set aside, or judgment for the defendant master entered, notwithstanding such verdict.

A Writ of Error to the Court of Record for Escambia County; C. M. Jones, Judge.

Judgment affirmed.

John P. Stokes, for Plaintiff in Error;

Blount & Blount and Carter, for Defendant in Error.

GIBBS, Circuit Judge.—This was an action brought by Henry Williams, the plaintiff in error here, and hereafter in this opinion referred to as the plaintiff, against Walker D. Hines, as Director General of Railroads, the defendant in error here, and hereafter in this opinion referred to as the defendant, and one Drew Williams, the employe of the defendant Hines. The declaration avers that in December, 1918, in Escambia County, Florida, the Louisville and Nashville Railroad was a common carrier of passengers for hire, between the City of Pensacola, Florida, and Flomaton, Alabama, and intermediate points, and, as such, was possessed of a certain line of railroad, locomotives propelled by steam, and cars for transportation of passengers between said points, and was then and there under Federal control and the defendant, W. D. Hines is now Director General of said railroad; that, at that time, the defendant, Drew Williams, was in the employ of said railroad in the capacity of engineer upon one of its locomotives drawing a train of cars over its said line; that, at that time, when the plaintiff, Henry Williams, was a passenger upon one of defendant's said train

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of cars, and while said train was standing upon defendant's said line of railroad, at the station of McDavid, in said county, the said Louisville and Nashville Railroad Company by and through its said agent, the defendant, Drew Williams, did carelessly and negligently propel another of said railroad company's locomotives and train of cars at and against the train of cars on which the plaintiff was a passenger, striking the same with great force and violence, thereby giving to plaintiff certain wounds and injuries set forth particularly in the declaration, but unnecessary to be here enumerated, wherefore the plaintiff claimed \$20,000. To this declaration the defendants pleaded the general issue. At the trial the jury rendered a verdict against the defendant Hines in the sum of \$4,500 with interest from date of suit and in favor of the defendant Williams. The defendant Hines filed his motion for judgment *non obstante veredicto*, upon the ground that the declaration relies for recovery against the defendant Hines solely upon the negligent act of the defendant, Drew Williams, and that the jury had found in favor of the defendant Williams. The motion was granted and judgment was entered against the plaintiff and in favor of the defendants. To this judgment the plaintiff sued out writ of error to this court.

There is but one assignment of error: "The Court erred in granting the motion of the defendant, Walker D. Hines, as Director General of Railroads, for the entry of a judgment herein in favor of the defendant, notwithstanding the verdict in favor of the plaintiff, and in entering judgment for the defendant, notwithstanding the verdict in favor of the plaintiff."

The evidence in the case, omitting that portion detailing the injuries and losses suffered by the plaintiff be-

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cause of the accident, is shown in the bill of exceptions as follows:

Plaintiff offered evidence which tended to prove that on the 8th day of December, A. D. 1918, about 30 minutes after midnight, a regular passenger train of the Louisville & Nashville Railroad was stopped upon the railway tracks at the station called McDavid, in Escambia County, Florida, about thirty miles north of Pensacola, said train being enroute from Pensacola to Flomaton, Alabama; that when said train stopped at said station for the disembarkation of passengers and the embarkation of passengers, the plaintiff, Henry Williams, having a ticket entitling him to be transported as a passenger on said train from said station of McDavid to Brewton, Alabama, boarded said train by means of certain steps, and, while upon the platform of a car, and just as he was in the act of going through the door leading into the car, the said train was struck on the rear end with great force and violence by another train of the Louisville & Nashville Railroad, coming from Pensacola and going to Flomaton, the defendant, Drew Williams, being engineer in charge of said second train; that both trains were sections of a train that was due to leave Pensacola between 10 and 11 P. M.; and on account of the heavy traffic it was cut into two sections; that as a result of the second train striking the first train with great violence, the plaintiff was thrown about twenty feet, striking against certain seats in the car and was finally thrown to the floor in a heap, injuring him.

On behalf of the defendants, evidence was offered which tended to prove that the first section of the train left Pensacola thirty-nine minutes ahead of the second section; that on the night in question a heavy fog was

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prevailing; that while the usual bright electric headlight was on the second train, the engineer, Drew Williams, did not and could not see the train standing on the track at McDavid until he had gotten about sixty feet from it, and that when he discovered the presence of the first train he applied his brakes, shut off his steam, and jumped from the train; that he did not know that the first train was at McDavid, but thought it might be there and approached the station traveling at about twelve miles per hour; that no lights or other warnings were given him before reaching McDavid, that the first train was at that station, and that he did not receive any orders from the dispatcher that the first train was at McDavid, and that the first he knew of its presence was when he saw the rear end of it about sixty feet ahead of his train; that before reaching McDavid and about one-half mile therefrom, he saw ahead sixty feet a whistling post which was about five feet high and about one foot square, and was painted white and had certain numbers painted on it; that he blew for the station at this board; that the first train had been at McDavid only one minute before the arrival of the second train, and that all passengers to leave the train had not left it at the time of the collision, and that passengers were not supposed to board the train until all passengers had left that were to leave the train at that point, and that if plaintiff boarded the train he did so before he was supposed to get on it, in that he was supposed to wait until all passengers had gotten off at that point before he should have gotten on. That after the collision the conductor and flagman went through the train and interrogated the passengers as to whether they had been injured and neither of them saw plaintiff, nor did he make any complaint to them.

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The court instructed the jury that this was an action by the plaintiff against the defendants for "damages for certain personal injuries which he claims he has sustained by reason of certain negligence of Drew Williams, as the agent of the Louisville & Nashville Railroad."

But a single question is presented, was the judgment for the Director General properly entered upon the verdict of the jury?

Where the common law rule prevails, unmodified by statute, the weight of authority supports the holding that in an action against a principal, or master, and his agent, or servant, for damages resulting solely from the negligence of the agent, or servant, acting as such, a verdict of the jury exonerating the agent, or servant, exonerates the principal or master. They are in no sense joint tortfeasors, but the basis of the liability of the principal, or master, is the well known doctrine of respondeat superior.

The case of *Hobbs v. Illinois Central Railroad Company*, 171 Iowa 624, 152 N. W. Rep. 40, L. R. A. 1917E, p. 1023, is illustrative of this holding. In that case the plaintiff was one of several shippers of live stock over defendant's road who were accompanying the stock as caretakers. The caboose in which they were traveling being somewhat crowded, when they reached a station on the road they boarded a passenger train about to leave for their destination. The conductor of that train told them that they must have tickets and that their transportation on the stock train was insufficient and that they should get off and get tickets. There being no response, the conductor said, "Must I get an officer and put you off?" and then went out and returned with the defendants Core and Gressley, who were guards of the defendant company, whereupon the conductor told the

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guards to put the stockmen off. In so doing the plaintiff alleges he was mistreated and injured by the guards without fault of his own. There was conflict in the evidence.

The Court, through LADD, J., says, L. R. A., text page 1026, 1027:

"It will be seen that the wrongs, if any, done to plaintiff were by the defendants, Core and Gressley, and the company is liable therefor, if at all, only (1) because of its being responsible as their superior as principal or master, they being agents or servants, or (2) because of a breach of its duty to protect passengers against the wrongs, if any, such as they committed. It may be conceded that as a carrier of passengers the company was required to exercise toward plaintiff the highest degree of care for his safety and protection, though it is doubtful whether he ever became a passenger, *Ray v. Chicago & N. W. R. Co.*, 163 Iowa. 430, 144 N. W. Rep. 1018. But if remiss therein, and there was a breach of this duty, it was in directing Core and Gressley to commit on him the wrongs complained of. These were the only ones from which plaintiff claimed to have suffered, and if no wrongs were committed by them, then nothing remained for which the company could have been held responsible. The jury, however, returned a verdict for defendants, Core and Gressley, but against the company. The latter moved that judgment be entered in its favor because of the exoneration of the other defendants. The motion was overruled. Thereupon the company moved for a new trial, and this motion was overruled, and judgment entered on the verdict in favor of Core and Gressley and against the company. Counsel for the company contend that the exoneration of its co-defendants necessarily relieves it of all responsibility, and that there was error in assessing

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against it any damages whatever. It seems impossible to avoid this conclusion. The responsibility of the company was necessarily dependent upon the culpability of its co-defendants who were the immediate actors. And yet in the same action by the same plaintiff for the same wrongs that were adjudged not culpable, and the company adjudged culpable, though it was without fault, save as responsible for the acts of its co-defendants. The trial proceeded, on the theory that it was essential in order to recover that the jury find Core and Gressley to have been employees or agents of the company. If they were such, then the company was only liable as their superior, and not because of anything it did by or through any other.

“As said in *Doremus v. Root*, 23 Wash. 715, 54 L. R. A. 649, 63 Pac. Rep. 574; ‘Joint tort-feasors are liable to the injured person (other than that he may have but one satisfaction), as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of actions are in no sense joint tort-feasors, nor does their liability to the plaintiff rest on the same or like grounds. The act of an employee, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondet superior*—the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment

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and engaged in his master's business. The primary liability to answer for such an act therefore rests upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee.'

"The principle so clearly expressed has been approved by this court in *White v. International Textbook Co.*, 150 Iowa 27, 129 N. W. Rep. 338, followed in *Dunshee v. Standard Oil Co.*, 165 Iowa 625, 146 N. W. Rep. 834, and is sustained by the overwhelming weight of authority. *Portland Gold Min. Co. v. Stratton's Independence*, 16 L. R. A. (N. S.) 677, 85 C. C. A. 393, 158 Fed. 63; *Hill v. Bain*, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; *Anderson v. Fleming*, 160 Ind. 597, 66 L. R. A. 119, 67 N. E. 443; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Gardner v. Southern R. Co.* 65 S. C. 341, 43 S. E. 816; *McGinniss v. Chicago, R. I. & P. R. Co.*, 200 Mo. 347, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; *Hayes v. Chicago Teleph. Co.*, 218 Ill. 414, 2 L. R. A. (N. S.) 764, 75 N. E. 1003; *Ferguson v. Truax*, 132 Wis. 478, 14 L. R. A. (N. S.) 350, 110 N. W. 395, 112 N. W. 513, 13 Ann. Cas. 1092; *Muntz v. Algiers & G. Street R. Co.*, 116 La. 236, 40 So. 688; *Chicago, St. P. M. & O. R. Co. v. McManigal*, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243.

"Where the real actor who is none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be."

And see also: *Fimple v. So. Pac.*, 38 Cal. App. 727, 177 Pac. 871; *St. L. & S. F. Ry. Co. v. Dancy*, — Okla. —; 176 Pac. Rep. 209; *Bauer v. Great Northern R. R.* N. D. , 169 N. W. Rep. 84; *Sparks v. A. C. L.*, 109 S. C.

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145, 95 S. E. Rep. 344; *Jones v. Southern Railway*, 106 S. C. 20, 90 S. E. Rep. 183; *Thompson v. So. Pac.*, 31 Cal. App. 567, 161 Pac. Rep. 21; *N. C. & N. E. R. R. v. Jopes*, 142 U. S. 18-27.

While the general rule prevailing elsewhere is not questioned by the plaintiff in error, he contends that our statute law as embodied in sections 3148 and 3149 of the General Statutes of Florida very materially changes this rule in Florida as applied to the case at bar and makes the verdict rendered by the jury a proper verdict and one upon which judgment should have been entered in his favor as against the Director General.

These sections are as follows:

3148. *Liability of Railroad Company.*—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

3149. *When Recovery of Damages Forbidden.*—No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him.

This law was in force in Georgia before its adoption here.

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Southern Railway Company v. Harbin, 135 Ga. 122, 68 S. E. Rep. 1103, 30 L. R. A. (N. S.) 404, has been cited by counsel for the Director General. This was an action by the father for the alleged wrongful death of his son by the negligence of the railroad company and its servant, an engineer of said company. Under the allegations of negligence in the petition the only acts of negligence were committed by the engineer, who was operating the engine at the time it struck and killed the deceased. There was evidence supporting the allegations of negligence on the part of the engineer. The jury returned a verdict in favor of the plaintiff against the railway company, but in favor of the company's co-defendant, the engineer. The railway company made a motion for a new trial, which was overruled. In reversing the judgment, the Georgia Court, one justice dissenting, followed the weight of authority outside of the State and quoted from the Missouri Supreme Court in the case of McGinniss v. Chicago, R. L. & P. R. Co., 200 Mo. 347, where a verdict was found exonerating the servant in an action against the master and servant for personal injuries caused by the misfeasance of the servant, as follows: "We are firmly of the opinion that in cases where the right to recover is dependent wholly upon the doctrine of respondeat superoir, and there is a finding that the servant, through whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case at hand, there should be no judgment against the master. The verdict in this case is a monstrosity. The jury say French was guilty of no negligence, yet, in the same breath, say the company was guilty of negligence, although nothing further was done by the company than what it did through French, its servant."

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The dissenting opinion in this case has been called to our attention by counsel for the plaintiff in error, but we do not think that under the pleadings and the evidence in this case it is in point.

In Georgia the plaintiff, or petitioner, suing a railroad company is confined to the negligent act of the defendant causing him injury as alleged in his petition and he cannot recover for any other act, or acts, of negligence than the act, or acts, alleged. He is also required in such cases to specifically set out in his petition the acts of negligence he relies on for recovery. *Central of Georgia Ry. Co. v. Weathers*, 120 Ga. 475, 47 S. E. Rep. 956. In which case, just cited, the court says, text (S. E. Rep.) p. 957: "If there can be no recovery for acts of negligence not alleged in the petition it follows as a logical conclusion that there is no presumption of negligence against the company, other than as to acts alleged by the petition to have been negligent."

The common law method of pleading, except as changed by statute, prevails in Florida, and here a plaintiff is confined to the cause of action he has set forth in his declaration. The only negligence alleged in the declaration is the negligence of the co-defendant, Drew Williams, the engineer operating the train which ran into the train the plaintiff was entering. No recovery can be had for other negligence, *Wilkinson v. Pensacola and A. R. Co.*, 35 Fla. 82, 17 South. Rep. 71; *Louisville and N. R. Co. v. Guyton*, 47 Fla. 188, 36 South. Rep. 84, nor is there any presumption thereof. Had the plaintiff declared generally that he was injured in the negligent operation of the defendant's trains, and in this State such general allegation would be sufficient, upon proof of sufficient acts in the operation of said trains causing

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injury to the said plaintiff the statutory presumption of negligence of the defendant Director General would have arisen, and this presumption could have only been removed when the Director General had made it appear from a preponderance of the evidence that his agents had exercised all ordinary and reasonable care and diligence in the operation of his trains. The Consumers Elec. L. & St. R. R. Co. v. Pryor, 44 Fla. 354, 32 South. Rep. 797. There was no such presumption against Drew Williams, the engineer of the train, and the co-defendant of the Director General. Where the jury, however, have all the evidence before them and there is no conflict whatever as to the acts of the engineer, it would, in the words of the judge already quoted in a similar case, be "monstrous" to say that the engineer was blameless, but his master, who was only liable because of his acts, by virtue of a mere presumption, was negligent. JUDGE SHACKLEFORD, speaking for this court, in Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, text 473, has said, "The statute does not create such a presumption as will outweigh proofs or that will require any greater or stronger proofs than any other question at issue."

It does not appear to us from the evidence in this case that the plaintiff was negligent nor is there any plea to this effect; so that there is no question of contributory negligence.

In this case the jury, with the evidence of his acts before them, has, by its verdict, exonerated the defendant employee of all negligence. The recovery of the plaintiff being based solely on the acts of the employee, we feel that under our laws of pleading the action of the trial judge was not erroneous and that the judgment of the Court of Record should be affirmed.

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PER CURIAM.—The record in this cause having been considered by this court, and the foregoing opinion prepared under Chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the court that the judgment herein be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

W. W. BROWN, *Plaintiff in Error*, v. HARRY C. CASE, *Defendant in Error*.

Opinion Filed November 22, 1920.

1. The nature, validity and interpretation of contracts are governed by the *lex loci* of the country where the contracts are made or are to be performed; but the remedies are governed by the *lex fori*.
2. Section 1726, General Statutes of 1906, "When the cause of action has arisen in another State or Territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State." Construed, to give a debt or against whom a cause of action in another State or Territory, or in a foreign county, the benefit of the statute of limitations of those jurisdictions if they are shorter than in this State, and does not deprive him of his privilege of pleading the Florida statute, even if the cause of action is not barred by the limitation statutes of any other State or Territory, or foreign State.

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A Writ of Error to the Circuit Court for Pinellas County; O. K. Reaves, Judge.

Judgment affirmed.

Hilton S. Hampton and *S. S. Sandford*, for Plaintiff in Error;

Davis & Harris, for Defendant in Error.

BROWNE, C. J.—On July 17th, 1907, the defendant in error executed in New York city certain promissory notes payable to his own order at the Corn Exchange Bank of New York. Before the cause of action on the notes accrued, the maker absented himself from the State of New York, and for more than six years thereafter has resided in the State of Florida.

On the 16th of October, 1919, the plaintiff in error, who was plaintiff below, brought suit in Pinellas County, Florida, against the defendant to recover on the notes. The defendant pleaded the statute of limitations of Florida, and the plaintiff filed a replication setting up "that at the time of the making and delivery of said notes, the plaintiff and defendant were both situate in the State of New York; that subsequent to the making and delivery of said notes, and within six years from date of maturity of said notes, and each of them, and when the causes of action accrued thereon and each of them, the defendant was without the State of New York, and has continued to reside without said State;" and that the cause of action was not barred by the statutes of New York.

A demurrer to the replication was sustained, and the plaintiff declining to plead further, judgment was entered

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against him without prejudice to his right "to institute such action as he may be advised where the cause of action accrued," from which judgment writ of error was taken to this court.

The sole question involved, is whether the statute of limitations of Florida, where the action was brought, is applicable, or that of the State of New York, where the cause of action accrued.

It seems well settled, in the absence of a statute to the contrary, that suits on contracts must be brought within the period prescribed by the law of the State where the suit is instituted, otherwise they will be barred, and that in considering the effect of a statute of limitations the *lex fori* and not the *lex loci contractus* governs.

This question first came before the Supreme Court of the United States in *M'Cluny v. Silliman*, 1830, 3 Peters (U. S.) 270, where the court said: "It is a well settled principle, that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction." * * * "Of late years, the courts in England, and in this country, have considered statutes of limitation more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law, within a reasonable time a salutary vigilance is imposed, and an end is put to litigation."

This was followed in *M'Elmoyle v. Cohen*, 1839, 13 Peters (U. S.) 312, where the court said: "Such being the faith, credit and effect to be given to a judgment of one

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State in another, by the Constitution and the Act of Congress, the point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that settled the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy; and, consequently, that the *lex fori* must prevail."

In *Townsend v. Jemison*, 9 How. (U. S.) 407, the court again considered the question and fully and emphatically reaffirmed its previous decision. The court in that case said: "The rule in the courts of the United States, in respect to pleas of the statutes of limitation. has always been that they strictly affect the remedy, and not the merits. In the case of *M'Elmoyle v. Cohen*, 13 Pet. 312, this point was raised, and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

"We thought then, and still think, that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought—the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign juris-

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prudence. Burge's Com. on Col. and For. Laws." * * * "There is nothing in *Shelby v. Guy*, 11 Wheat. 316, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be. 2 Bingham, New Cases, 202, 211; *Don v. Lippman*, 5 Clark & Fin. 1, 16, 17. It has become, as we have already said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment."

The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.

"The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the *lex loci* of the country where the contracts are made or are to be performed; but the remedies are to be governed by the *lex fori*." *Perry v. Lewis*, 6 Fla. 555.

Later decisions from other jurisdictions lay down the same rule except where it has been changed by statute. See *Lamberton v. Grant*, 94 Maine 508, 48 Atl. Rep. 127; *State Bank of West Pullman v. Pease*, 153 Wisconsin 9, 139 N. W. Rep. 767. *Shaw v. Dickinson*, — Okla. —, 164 Pac. Rep. 1150.

Plaintiff in error contends that Sec. 1726, General Statutes of Florida, 1906, changes the well-settled rule, and in

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an action brought in this State on a cause of action accruing in another State, the statute of limitations of the State where the cause of action accrued, will control.

Sections 1726 is a modification of the rule prevailing in the United States courts, and in nearly all State jurisdictions, but only to the extent expressly stated; that is, "When the cause of action has arisen in another State or Territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State." Sec. 1726, Gen. Stats. of Florida, 1906.

Plaintiff in error asks that this statute be construed to mean, that if an action could be maintained against him in such State, the statute of limitations of Florida cannot be invoked. This we cannot do. It is clear that the Legislature intended to give a debtor against whom a cause of action accrued in other State or Territory, or in a foreign country, the benefit of statutes of limitations of those jurisdictions if they were shorter than that of this State. There is nothing in the statute from which we can conclude that the Legislature intended to deprive him of his privilege of pleading the Florida statute of limitations, even if the cause of action is not barred by these limitation statutes of any other State or Territory, or foreign State.

The demurrer to the replication to the first plea was properly sustained, and the judgment is affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

Catts v. Wilson et al.—Decision of Court.

SIDNEY J. CATTS, AS GOVERNOR OF THE STATE OF FLORIDA,
FOR THE USE AND BENEFIT OF MARION COUNTY, FLORIDA,
Plaintiff in Error, v. W. P. WILSON AND L. R. HAMPTON,
Defendants in Error.

Decision Filed November 22, 1920.

A writ of error to an order of the Circuit Court within
and for the County of Marion; W. S. Bullock, Judge.

L. N. Green, for Plaintiff in Error;

L. W. Duval and *R. B. Bullock*, for Defendants in
Error.

PER CURIAM.—This cause having heretofore been sub-
mitted to the Court upon the transcript of the record of
the order aforesaid, and briefs and argument of counsel
for the respective parties, and the record having been seen
and inspected, and the Court being now advised of its
judgment to be given in the premises, it seems to the
Court that there is no error in the said order; it is, there-
fore, considered, ordered and adjudged by the Court that
the said order of the Circuit Court be, and the same is
hereby, affirmed.

All concur.

Smith v. State of Florida—Syllabus.

ED SMITH, *Plaintiff in Error*, v. THE STATE OF FLORIDA,
Defendant in Error.

Opinion Filed November 22, 1920.

1. The name of the person alleged to have been killed in an information charging manslaughter is a material and essential allegation that must be proved before a conviction can be sustained upon such information.
2. The deceased is referred to in the evidence as a "little girl," and while it is probable that the "little girl" referred to as having been killed was the person alleged in the information to have been killed, an appellate court cannot, in the absence of any proof at all to that effect, infer that such was the case.

A Writ of Error to the Court of Record for Escambia County; C. M. Jones, Judge.

Reversed.

Walter Kehoe, for Plaintiff in Error;

Van C. Succarigen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WEST, J.—Information was filed by the Acting County Solicitor Philip D. Beall in the Court of Record of Escambia County against plaintiff in error charging him with the crime of manslaughter under the statute. Upon a trial there was a verdict of guilty as charged. From the judgment imposing sentence writ of error was taken.

One question only is presented, namely, the sufficiency of the evidence to support the verdict. In all other re-

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spects the evidence is ample, but there is no proof that the person killed is the person alleged in the information to have been killed. The information charges that "the said Ed Smith, did then and there unlawfully, without authority of law, and by and through his own act, procurement and culpable negligence, and with utter disregard for the life and safety of one Mary Ida Bogich, drive said automobile of his culpable negligence, at a high rate of speed and in a negligent, careless and reckless manner into and against the said Mary Ida Bogich, whereby the said Mary Ida Bogich was then and there violently thrown to the ground, and the said Ed Smith in the manner and by the means aforesaid, without authority of law, and by and through his own act, procurement and culpable negligence did then and there give to and inflict upon the said Mary Ida Bogich, in and upon her body and head mortal wounds, bruises and contusions of which said mortal wounds, bruises and contusions so given and inflicted unlawfully without authority of law, and by and through the said act, procurement and culpable negligence of the said Ed Smith, the said Mary Ida Bogich then and there on said day died."

There is ample proof that a "little girl" was killed by plaintiff in error in the manner and by the means alleged in the information, but there is nothing in the evidence to even suggest that the "little girl" whom plaintiff in error is shown to have killed was the person alleged in the information to have been killed by him. The name of the "little girl" is not mentioned by a single witness and there is a total failure to identify by evidence the person actually killed with the person alleged to have been killed. The name of the person alleged to have been killed in an information charging manslaughter is a material and

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essential allegation that must be proved before a conviction can be sustained. Underhill on Crim. Ev. (2 ed.) §316, p. 552; 1 Wharton's Crim. Ev. (10 ed.) §94, p. 286; 2 Bish. New Crim. Proc. §65; 1 Elliott on Ev. §200, p. 285; Jacobs v. State, 46 Fla. 157, 35 South. Rep. 65; Humbard v. State, 21 Tex. App. 200, 17 S. W. Rep. 126; Shepherd v. The People, 72 Ill. 480; Davis v. The People, 19 Ill. 74. While it is probable that the "little girl" referred to in the evidence as having been killed was the person alleged in the information to have been killed, we cannot infer, in the absence of any proof at all to that effect, that such was the case. An indictment charging manslaughter of a specifically named person is not proved by evidence of the manslaughter of an unnamed person.

Because of the failure to offer evidence in proof of this essential allegation of a material element of the crime charged the judgment must be reversed and the case remanded for a new trial.

Reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

BERT LASHIER, *Plaintiff in Error*, v. THE STATE OF FLORIDA,
***Defendant in Error*.**

Opinion Filed November 22, 1920.

1. A "Ford touring car" is a sufficient description of the article alleged to have been stolen, to bring the offense within the provisions of Section 3288, General Statutes of 1906.

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2. Where an information contains more than one count and only the last count concludes with the words "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida," such conclusion reaches back to each count, and it is not necessary that each count should so conclude.
3. No single count in an indictment containing more than one is the indictment. The indictment is the thing which contains all the counts, and where it concludes with the words "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida" the conclusion belongs to the entire indictment and applies to each count.

A Writ of Error to the Criminal Court of Record for Dade County; J. Emmet Wolfe, Judge.

Judgment affirmed.

R. B. Gautier and *Bart A. Riley*, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

BROWNE, C. J.—Bert Lasher was convicted of larceny on an information charging him in the first count with the larceny of a Ford touring car, and in the second count with receiving, abetting and aiding in the concealment of a Ford touring car.

A motion was made by the defendant to quash the information upon several grounds, but we need consider only those relating to the first count, upon which the defendant was convicted.

The grounds of the motion to quash that are argued by the plaintiff in error are that the information does

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not charge that the property stolen was an automobile and that the information does not follow the language of Chap. 7358, Laws of Florida, approved May 28, 1917, which provides that the "larceny of an automobile, locomobile, motorcycle, and other like vehicles propelled by electricity, gasoline or kerosene, should be deemed a felony." One difference between this statute and the general larceny statute is that the larceny of any of the vehicles described in Sec. 1 of Chap. 7358 is a felony irrespective of its value, and under the general larceny statute it is not a felony unless the value is \$20.00 or more. There is also a difference in the penalty, but that is not involved here. Both these statutes are in force, and although they differ they are not conflicting, and a prosecution for larceny of an automobile will lie under either.

The information in this case charges that the article stolen was "one Ford touring car of the value of \$300.00." It is not necessary for us to decide whether in a prosecution under Chap. 7358 the description of the article stolen as "a Ford touring car" will bring it within the provision of Sec. 1, and identify it as "an automobile, locomobile, motorcycle, and other like vehicles propelled by electricity, gasoline or kerosene." Where it is intended that the prosecution shall be under Chap. 7358, prosecuting officers would do well to describe the article in the language of the statute.

A "Ford touring car" is a sufficient description of the article alleged to have been stolen to bring the offence within the provisions of Sec. 3288, Gen. Statutes, 1906, and as the complaining witness testified that he paid \$275.00 for the stolen car, and no other testimony of its value was introduced, we must infer that the jury ac-

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cepted this as the value of the car and found the defendant guilty of the grand larceny described in the first count.

The next ground of the motion to quash that is discussed by the plaintiff in error is that the first count fails to state that the larceny charge "was contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida." It is true that these words do not appear at the end of the first count, but they do appear at the end of the second count. The rule that prevails in most jurisdictions, and one which we approve, is that such a conclusion to the whole charge is sufficient, and that it is not necessary that each count should so conclude. 14 R. C. L. 167; *Starling v. State*, 90 Miss. 255, 43 South. Rep. 952; 13 Ann. Cas. 776 and Note; *State v. Fley*, 2 Brev. (S.C.) 338, 4 Am. Dec. 583.

In Mississippi, from which State the case of *Starling v. State*, *supra*, is reported, there is a constitutional mandate that "All indictments shall conclude against the peace and dignity of the State." There is no such constitutional mandate in Florida, but assuming that good pleading requires every indictment for a statutory offence shall conclude with those words, the information in this case is not bad, because they are found at the conclusion of the information. In discussing this question the Supreme Court of Mississippi said:

"No single count in an indictment containing more than one is the indictment. The indictment is the thing which contains all the counts. There may be many counts, but there can be but one indictment. The bill of indictment, in the language of the law, is a unit, is one complete thing, and it is this bill of indictment to which

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the Constitution has reference in Section 169. The bill of indictment in this case did conclude, as the Constitution requires, with the words 'against the peace and dignity of the State.' Those words, whenever they appear at the conclusion of an indictment, necessarily apply to every count in the indictment going before its conclusion, and it would be the merest tautology to repeat them at the end of each count. All that is meant, when it is said that each count must be complete in itself, is that each count must completely and accurately define the offence, giving all its essential constituent elements, embraced in that count; and, whenever a count in an indictment does that, it has perfectly fulfilled its office. The words in this indictment 'against the peace and dignity of the State,' do not belong to either count, technically considered. They belong to the conclusion of the whole indictment, as the Constitution requires."

The only other point to be considered is that the verdict was contrary to and not supported by the evidence. It is true that the Ford touring car alleged to have been stolen, when found and parts of it identified, was not assembled as it was when stolen. Parts had been removed and placed on other cars, and parts of other cars substituted therefor. The owner identified one or more of his tires and other parts of his car, but he could not say that any one car was entirely his, but he testified that he also found a car which he knew to be his, "with the exception of some parts that were taken away." We think there was sufficient identification to warrant the verdict upon that point. He lost one Ford touring car, and he found the greater part, if not all of it, in the possession of the defendant, whom the jury believed from this and other evidence had stolen the car. The mere fact that the entire car was not found in the same con-

Dykes v. State ex rel. Spivey—Syllabus.

dition as when it was stolen does not affect the identification.

Finding no errors, the judgment is affirmed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

JIM DYKES, *Plaintiff in Error*, v. STATE OF FLORIDA *ex rel.*
NORA SPIVEY, *Defendant in Error*.

Opinion Filed November 22, 1920.

Petition for Rehearing Denied January 27, 1921.

Where there is competent evidence sufficient to support the verdict and no material or harmful errors of law appear, the judgment will not be reversed because of conflicts in the evidence.

A Writ of Error to the Circuit Court for Jackson County; C. L. Wilson, Judge.

Affirmed.

John H. Carter, for Plaintiff in Error;

W. E. B. Smith, for Defendant in Error.

WEST, J.—In a bastardy proceeding the verdict was in favor of the plaintiff. Judgment thereupon was entered against the defendant as provided by statute. Writ of error was taken and the case is here for consideration by this court.

Sewell et al. v. Burdine—Syllabus.

There are two assignments of error. Under the first assignment it is urged that the certificate of the County Judge transmitting the cause to the Circuit Court was defective and ineffectual for that purpose for various reasons, and under the second assignment the contention is that there was error in denying defendant's motion for a new trial on the ground that the verdict is not supported by the evidence and is contrary to law.

There was no error in either of the orders complained of and neither of the assignments is well taken. The certificate transmitting the cause to the Circuit Court is in substantial compliance with the statute. The sufficiency of the complaint is not questioned. In the Circuit Court the issue was made by a plea of not guilty to the complaint. There is ample evidence to support the verdict against the defendant.

The judgment will be affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
CONCUR.

JOHN SEWELL AND E. G. SEWELL, PARTNERS, DOING BUSINESS AS JOHN SEWELL & BRO., *Appellants*, v. JOHN M. BURDINE, *Appellee*.

Opinion Filed November 22, 1920.

A written agreement under seal between the owners of adjacent
• lots relating to the opening and maintaining of an alley running across the ends of the two lots, construed to be an easement created by the parties over the two lots for the benefit of the owners respectively.

Sewell et al. v. Burdine—Opinion of Court.

An Appeal from the Circuit Court for Dade County; H. Pierre Branning, Judge.

Order reversed.

Price, Price & Small, for Appellants;

Atkinson & Burdine, for Appellee.

ELLIS, J.—John Sewell & Bro. sought to enjoin John M. Burdine from closing or obstructing an alley across the end of lot one occupied by Burdine extending to and across lot two occupied by Sewell & Bro.

Upon application by complainant for an injunction the bill was dismissed and Sewell & Bro. appealed.

The agreement under which the alleyway was established was under the seal of the parties thereto who at the time owned the two lots respectively. Years afterward Burdine became the occupant of lot one as the tenant of the grantee of the former owner and party to the agreement, and seeks to close the alley without the consent of Sewell & Bro.

We regard the agreement as one creating an easement over lots one and two, each lot is burdened by the agreement with an easement over it for the benefit of the owner or occupant of the owner, one which may be extinguished of course by abandonment or mutual agreement.

The agreement constituted more than a mere license and if it bore only the significance which counsel for defendant claims there would have been no purpose in executing the formal agreement which the parties entered into to create the alleyway.

Graham et al. v. Sewell et al.—Syllabus.

The order appealed from is reversed.

BROWNE, C. J., AND TAYLOR AND WEST, J. J., concur.

WHITFIELD, J., dissents.

E. A. GRAHAM, W. R. BURTON, S. E. LIVINGSTON, H. R. PRIDGEN, R. F. TATUM, CARL DEDEN, J. B. TOWER, AND M. C. HARDEE, AS INDIVIDUALS AND AS COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE WHITE ROCK QUARRY COMPANY, *Plaintiffs in Error*, v. JOHN SEWELL AND W. S. MORROW, AS COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JOHN SEWELL DYNAMITE COMPANY, *Defendants in Error*.

Opinion Filed November 22, 1920.

In an action against stockholders of a supposed corporation, where for failure to comply with the statute as to the incorporation, the statute imposes a liability as "members of a general partnership," and the action against the defendants is "as individuals and as co-partners," but some of the defendants are not jointly liable with the others, a joint judgment against them all is erroneous.

A Writ of Error to the Circuit Court for Dade County; H. Pierre Branning, Judge.

Judgment reversed.

Shutts & Bowen, Lilburn R. Bailey and Uly O. Thompson, for Plaintiffs in Error;

Graham et al. v. Sewell et al.—Opinion of Court.

Price, Price & Small, for Defendants in Error.

WHITFIELD, J.—The declaration herein is as follows:
“JOHN SEWELL AND W. S. MORROW, AS COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JOHN SEWELL DYNAMITE COMPANY, *Plaintiffs*, v. E. A. GRAHAM, W. R. BURTON, S. E. LIVINGSTON, H. R. PRIDGEN, R. F. TATUM, CARL DEDEN, J. B. TOWER AND M. C. HARDEE, AS INDIVIDUALS AND AS COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE WHITE ROCK QUARRY COMPANY, *Defendants*.

“Now comes the plaintiff in the above styled and entitled cause and sues the defendants E. A. Graham, W. R. Burton, S. E. Livingston, H. R. Pridgen, R. F. Tatum, Carl Deden, J. B. Tower, and M. C. Hardee, as individuals and as copartners doing business under the firm name and style of the White Rock Quarry Company, who have been duly summoned herein; and for cause of action says:

“For that, whereas, at the time of the institution of this suit the said defendants were and still are indebted to the plaintiffs in the sum of \$3,756.24 for:

“1. Money payable by the said defendants to the plaintiffs for goods, wares, and merchandise sold and delivered by the plaintiffs to the defendants;

“2. And in a like sum upon an account stated between the plaintiffs and defendants;

“3. And in a like sum for moneys lent by the plaintiffs to the defendants at their request;

“4. And in a like sum for moneys received by the defendants for the use of the plaintiffs;

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"5. And in a like sum for work done and materials furnished by the plaintiffs to the defendants at the defendants' request.

"Plaintiff avers that although said sums of money are long since past due, yet the defendants have failed and refused to pay the same or any part thereof.

"Wherefore, plaintiffs sue and allege their damages by reason of the premises in the sum of \$5,000.00"

"Exhibit A" contains items entered from August 31, 1916, to December 30, 1917. Thomas Brewer and J. W. Thompson were added as defendants. Judgment was rendered against the defendants as copartners for a stated amount, and the defendants took writ of error.

The defendants were stockholders of a supposed corporation in the forming of which the statutory requirement that duplicate affidavits by the treasurer that ten per cent. of the capital stock had been subscribed and paid shall be filed with the Secretary of State and Clerk of the Circuit Court of the county wherein the principal place of business is located, had not been complied with. Sec. 2652, Gen. Stats 1906, Compiled Laws, 1914. In such cases the statute provides that "the stockholders shall be personally liable for all the corporate debts as if they were members of a general partnership and not stockholders of a corporation." Sec. 2652, Gen. Stats. 1906, Compiled Laws, 1914. The liability being that of "members of a general partnership," the rules of partnership liability at common law govern. See *Winfield Packing Co. v. Truitt*, 71 Fla. 38, 70 South. Rep. 775; *Mechanics & Metals Nat. Bank v. Angel*, 79 Fla. 761, 85 South. Rep. 675.

The action being against the defendants "as individuals

Merchant v. Merchant—Syllabus.

and as copartners," the liability of all as alleged must be shown. *Rentz v. Live Oak Bank*, 61 Fla. 403, 55 South. Rep. 856.

It appears that some of the defendants were not stockholders when some of the items of indebtedness were incurred, and as under the statute their liability is that of partners and not stockholders, the liability of each is not joint, no special agreement or *circumstances* imposing joint liability on all of the defendants being shown. All the defendants not being jointly liable for all the items a joint judgment against all of them is erroneous.

Judgment reversed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

OLIVE MERCHANT, *Appellant*, v. MARY MERCHANT, *Appellee*.

Opinion Filed November 24, 1920.

In a proceeding for divorce where counter averments are made in the answer charging the complainant with extreme cruelty and adultery, the testimony examined and found sufficient to support the chancellor's decree, but not upon the ground recited in such decree.

An Appeal from the Circuit Court of Palm Beach County; E. B. Donnell, Judge.

Decree affirmed.

C. D. Abbott, for Appellant;

Merchant v. Merchant—Opinion of Court.

No appearance for Appellee.

PER CURIAM.—The appellant brought suit for divorce against the appellee upon the grounds of extreme cruelty by defendant toward complainant and habitual indulgence by defendant in violent and ungovernable temper. The defendant answered the bill, denying the allegations of fact intended to show extreme cruelty by her toward complainant and indulgence by her in violent and ungovernable temper, and made counter averments against her husband of acts of cruelty and adultery. The bill prayed for divorce from the defendant and that the custody of the three minor children, the issue of their marriage, be awarded to complainant.

The defendant prayed for divorce from her husband and that the custody of the children be awarded to her, for an allowance of money sufficient for the maintenance of herself and children, and suit money.

Testimony was taken and the chancellor rendered a decree in favor of the defendant, finding that the complainant had been guilty of adultery as alleged in the answer and cross-bill, decreeing a divorcement of the parties, awarding the custody of the children to the defendant, and awarding an allowance of money to be paid by the complainant to defendant for maintenance of herself and children, and a further sum for solicitor's fees.

This court having read and inspected the record and being advised of its judgment to be given in the premises, it seems to the court that there is no error in the decree save the finding that the defendant was guilty of adultery as alleged in the answer and cross-bill. There is sufficient evidence, however, to support the chancellor's decree upon the grounds of extreme cruelty.

Ormond v. State of Florida—Syllabus.

It is, therefore, considered, ordered and adjudged by the court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

BESSIE ORMOND, *Plaintiff in Error*, v. THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed November 24, 1920.

An indictment for the offense of assault with intent to commit murder, which alleges that the assault was made "unlawfully and from a premeditated design to affect the death" of the person assaulted, sufficiently alleges the statutory "intent" to commit the ^{1st} degree of murder.

A Writ of Error ^{1st} _{Criz.} W. C. Criminal Court of Record for Dade County; J. E. Wolfe, Judge.

Affirmed.

R. B. Schallern, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and Worth W. Trammell, Assistant, for the State.

WEST, J.—Plaintiff in error was informed against upon a charge of assault with the intent to commit the offense of murder in the first degree. There was a motion to quash the information upon the grounds that it (1) charged no offense; (2) was vague and indefinite; (3) was argumentative and stated conclusions of law; and (4) did

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not sufficiently inform plaintiff in error of the charge intended to be made against her so that she could properly prepare her defense. This motion was overruled. Upon a trial of the case a verdict of guilty as charged was returned by the jury and sentence was imposed by the court. Thereupon a motion in arrest of judgment was made. The grounds of this motion are that the information (1) charges no offense; and (2) does not allege facts sufficient to constitute the offense attempted to be charged. This motion was also overruled and writ of error was taken. There were other proceedings, but the assignments of error challenge only the two rulings mentioned.

The only question presented is whether the information contains allegations sufficient to charge the offense of assault with intent to commit murder in the first degree under the statute, ~~and it fails to~~ ^{specific} contention as stated in the brief is that ~~the information does not~~ ^{inform} the gist of the offense and the information ~~does not~~ ^{insider} inform the intent with certainty." So much of the ~~the~~ ^{the} charge as is necessary to be set out for a proper ~~cont~~ ^{con} sideration of this question is as follows: "that Bessie Ormond, laborer, late of the County of Dade, and State of Florida, on the 13th day of April, in the year of our Lord one thousand nine hundred and twenty, in the County and State aforesaid, unlawfully and from a premeditated design to effect the death of one Eliza Bragg, with a certain deadly weapon, to-wit, an open razor, which she, the said Bessie Ormond then and there had and held, in and upon the said Eliza Bragg, an assault did make, and did then and there cut, stab and wound the said Eliza Bragg, unlawfully feloniously and from a premeditated design to effect the death of her the said Eliza Bragg, whereby and by force of the statute," etc.

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This court has held that an indictment for the offense of assault with intent to commit murder which alleges that the assault was made "unlawfully and from a premeditated design to effect the death" of the person assaulted, sufficiently alleges the statutory "intent" to commit the felony of murder. *Johnson v. State*, 53 Fla. 45, 43 South. Rep. 779; *Barebr v. State*, 52 Fla. 5, 42 South. Rep. 86. Under this rule the indictment in this case is not amenable to the objection urged against it, and the judgment must therefore be affirmed.

Affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

THOMAS WILSON AND ELIZABETH WILSON, HIS WIFE, *Appellants*, v. C. P. DAVIS, *Appellee*.

Opinion Filed November 27, 1920.

When in a deed conveying title to lands, a lien for purchase money is *expressly* reserved in the conveyance, it may be enforced in equity, though actions on the notes given for the amount due are barred by the statute of limitations.

An Appeal from the Circuit Court for Marion County;
W. S. Bullock, Judge.

Order reversed.

Whitaker, Himes & Whitaker, for Appellants;

H. M. Hampton, for Appellee.

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WHITFIELD, J.—An amended bill brought by Davis, the appellee, contains the following:

“1. Your orator is the owner in fee simple and owns a fee simple title and estate of, in and to the lands, situated in Marion County, Florida, which are specifically described in the original bill of complaint, to which reference is prayed.

“2. On the 28th day of February, 1907, the defendant, Thomas Wilson, was the owner of the said lands, and on said date, joined by his wife, Elizabeth Wilson, who joined therein for the purpose of relinquishing dower, executed and delivered to the McGehee Lumber Company, a corporation, a deed of conveyance of the said lands, together with other lands and timber, for the purchase price of \$82,062.70, part of which was paid in cash and the remainder, \$60,862.70, was evidenced by two certain promissory notes of said date, each in the sum of \$30,431.35, each bearing interest at eight per cent. per annum until paid. And to secure the payment of said notes the said Thomas Wilson, in and by said deed of conveyance, reserved unto himself a vendor's lien on said lands and timber so sold and conveyed by him as aforesaid, to secure the payment of the purchase money for said lands and timber rights, as is more fully shown by a copy of the said deed attached to the original bill, which copy omits the description of all lands and timber not involved in this suit, and which copy is made a part hereof as Exhibit A, and reference thereto is prayed.

“3. Afterwards the said McGehee Lumber Company sold and conveyed the said lands to the Florida National Land Company, and the Florida National Land Company conveyed and sold said lands to your orator, and your orator is now the owner thereof as aforesaid.

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"4. Your orator further shows that the two notes above mentioned and referred to and described in the deed aforesaid, for the payment of which a vendor's lien was reserved, as provided by the aforesaid deed, were not under seal, but were mere negotiable notes and were made payable six and twelve months after date, respectively. And your orator charges that the said notes became due and payable six and twelve months, respectively, after February 28th, 1907, so that on and after the 28th day of February, 1913, the said notes and each of them were unenforceable, and your orator charges that the debt or obligation of the McGehee Lumber Company to the said Thomas Wilson, on account of the transaction aforesaid, has become barred by limitation and is absolutely unenforceable in the State of Florida, that no suit could be brought thereon to enforce the same and the said obligation has long since become unenforceable, and by reason thereof the vendor's lien attempted to be reserved by said deed of conveyance has become extinguished, and the same no longer exists, but creates a cloud on your orator's title, which should be removed by this court.

"5. Your orator further charges that the McGehee Lumber Company went out of business about April, 1913, a receiver of its affairs having been appointed, and its business was subsequently wound up through a receivership, of all of which the defendant, Thomas Wilson, had knowledge and notice, and your orator says that with knowledge of the fact that said company had long ceased to exist and with knowledge of the fact that said company had conveyed said lands to the Florida National Land Company, which conveyance was made in November, 1911, and recorded immediately thereafter in the public records of Marion County, Florida, yet the said Thomas Wilson,

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with knowledge of all of said facts, has failed and neglected to institute any proceedings of any kind to enforce said vendor's lien. And your orator charges that by reason of the fact that the note or obligation representing the indebtedness of the McGehee Lumber Company to the said Thomas Wilson, if any exist, is unenforceable and barred by the statute of limitations because the same has been due more than five years and has not been renewed or extended within the past five years, and the said obligations or promissory notes, if any exist, are not under seal, the said vendor's lien has lapsed and become extinguished.

“6. And your orator further says that the said reservation of said vendor's lien as aforesaid is depreciating the value of your orator's title to said lands, and the said defendants fail and neglect to institute any proceedings to enforce the same, so that your orator is without remedy in the premises save in a court of equity, and by reason of the premises your orator is being greatly injured and embarrassed in his enjoyment of the aforesaid lands, and he therefore charges that he is entitled to have the aforesaid pretended vendor's lien cancelled and set aside as a cloud on his title.

“The premises considered, therefore, your orator prays: That your honor will take cognizance and jurisdiction of this cause. that the vendor's lien created and reserved in and by the deed aforesaid may be decreed to have expired and become extinguished and that the same may be cancelled, set aside and declared void, as a cloud on the title of your orator; that the complainant may have subpoena in chancery directed to the defendants, Thomas Wilson and Elizabeth Wilson, his wife, commanding them on a day certain and under a certain penalty therein to be named, to be and appear before the Honorable Court to

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answer this your orator's bill of complaint, but not under oath, the oath to and verification of such answer being expressly waived; and that your orator may have such other and further relief, not herein specifically prayed, as the nature of the case may require and as to Your Honor shall seem meet and proper."

The deed of conveyance, executed by the grantor and his wife, and accepted by the grantee, contains the following:

"And the grantor hereby reserves unto himself a vendor's lien to secure the payment of the purchase money for said lands and timber rights, said lien being reserved to secure the sum of sixty thousand and eight hundred and sixty-two and 70/100 dollars, represented and evidenced by two certain promissory notes of even date, the 28th of February, 1907, each in the sum of thirty thousand four hundred and thirty-one and 35/100 dollars, each bearing interest at the rate of eight per cent. per annum from date until paid."

A demurrer to the amended bill of complaint was overruled, the court stating that the notes being barred by the statute of limitations, the lien reserved in the conveyance by the grantor "does not prolong the limitation applicable to the notes, and it is not enforceable as an independent covenant to pay the debt, nor enforceable against the lands conveyed." An appeal was taken.

In contemplation of law the grantee accepted the deed of conveyance of the lands subject to the lien expressed therein for the stated amount as the balance of the purchase price, and subsequent purchasers took conveyance of the lands with notice of and subject to the lien expressly reserved in the conveyance itself. 39 Cyc. 1792; 29 Am.

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& Eng. Ency. Law (2nd ed.) 780-782; 3 Devlin on Real Estate, Sec. 1235, p. 2325. The reserved lien is in the nature of a mortgage lien (*McKeown v. Collins*, 38 Fla. 276, 21 South. Rep. 103), and any grantee taking subject to the express lien, who seeks relief in equity to remove the lien as a cloud on title, should pay the amount of the lien or show an equity that discharges the lien. The complainant seeking affirmative action by a court of equity has not offered to do equity or shown a countervailing equity. See *Browne v. Browne*, 17 Fla. 607, as to the bar of the statute on the notes secured by the lien.

In *Shaylor v. Cloud*, 63 Fla. 608, 57 South. Rep. 666, and *McKay v. Ray*, 72 Fla. 599, 73 South. Rep. 367, the conveyances did not expressly reserve a lien for purchase money.

Order reversed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

EDWARD MCCLAIN, *Petitioner*, v. J. W. WEST, DEPUTY
SHERIFF OF CALHOUN COUNTY, *Respondent*.

Opinion Filed November 27, 1920.

1. Chapter 6877, Laws of 1915, Section 14, imposes a license tax of ten dollars upon allens or non-residents engaged in taking fish from the salt waters of the State, whether by hook, line, rod or reel, for purposes other than his own individual use, while operating in whole or in part a boat engaged in the fishing industry.

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2. One who pays the license provided for in Section 14 of the Act mentioned in the first head-note is not required to pay a further tax of ten dollars upon aliens or non-residents engaged in the fishing industry required by the succeeding paragraph of the same section.
3. An alien or non-resident employed upon a boat engaged in the fishing industry is required to pay the license whether he actually fishes or not, and if he is upon a boat not engaged in the fishing industry, but fishes for purposes other than his own use, he is required to pay the license of ten dollars—but one person is not required to pay both licenses.

A case of original jurisdiction.

Petitioner discharged.

John H. Carter and J. Bowers Campbell, for Petitioner;

Van C. Swearingen, Attorney General, and *Worth W. Trammel*, Assistant, for Respondent.

ELLIS, J.—Edward McClain is a non-resident of this State and was engaged in taking fish from the salt waters of St. Joseph's Bay and the Gulf of Mexico within the limits of the State, but not with hook and line, rod or reel, for purposes other than his own individual use, on boats operated by him in part, but owned by Southern Manhaden Corporation, and on which boats the license tax required by law had been paid. McClain had himself paid the additional license tax required of all aliens or non-residents *on boats* engaged in the fishing industry in this State, but refused to pay a further tax of ten dollars required by the succeeding paragraph of the same section of Chapter 6877, Laws of Florida, 1915, to be paid

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by "an alien or non-resident of this State who engages in taking fish or oysters from the salt waters of this State for any purpose other than his own individual use." Because of his refusal to pay the license tax of ten dollars required by the said paragraph of section fourteen he was taken into custody upon a warrant charging him with a violation of that provision of the Act and seeks his discharge from custody upon writ of *habeas corpus*.

In the case of *Curry v. Moran*, 76 Fla. 373, 79 South. Rep. 637, it was held that one situated as the petitioner was required to pay the license tax imposed by the fifth paragraph of section fourteen upon all aliens or non-residents who engage in taking fish from the salt waters of this State while operating in whole or in part a boat engaged in the fishing industry and that such tax was required in addition to the boat license tax. In such a case it is immaterial whether the licensee is the owner of the boat, manager or employee. The boat being engaged in the fishing industry, the alien or non-resident, whether owner, manager or employee, is required to pay the additional license. Having paid that license tax the petitioner was not required to pay the tax required by the succeeding paragraph to be paid by an alien or non-resident who engages in taking fish or oysters from the salt waters of this State for any purpose other than his own individual use. That paragraph, which is referred to as "paragraph six," requires the payment of ten dollars by any alien or non-resident who takes fish or oysters from the salt waters of this State for any purpose other than his own individual use, whether from a boat engaged in the fishing industry or not.

The purpose of the law is not to impose a double license tax upon aliens or non-residents engaged in the

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fishing industry, but to impose a license tax of ten dollars upon every alien or non-resident engaged in such enterprise temporarily or permanently.

If he is employed as engineer, oarsman, pilot or sailor, or in any capacity, upon a boat engaged in the fishing industry he is required by the law to pay the tax whether he ever casts a net or throws a fishing line or not; but if he is upon a boat which is not engaged in the fishing industry and fishes for purposes other than his own individual use, or without the use of a boat fishes for such purpose, he is required to pay the license tax of ten dollars. The last paragraph of the section exempts all persons from the provisions of the act who fish *only* with hook and line or with rod and reel or similar device.

The petitioner was not subject under the law to the payment of the license tax imposed by the sixth paragraph of the section, having paid the tax imposed by the fifth paragraph, and is therefore unlawfully held in custody.

It is ordered that the petitioner be and he is hereby discharged from custody.

TAYLOR, WHITFIELD AND WEST, J. J., concur.

BROWNE, C. J., concurs in the conclusion.

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SUSIE ROBINSON, *Plaintiff in Error*, v. THE STATE OF
FLORIDA, *Defendant in Error*.

Opinion Filed November 27, 1920.

HOMICIDE—DISCRETIONARY WITH TRIAL COURT IN PLACING WITNESSES UNDER THE RULE OF EXCLUSION DURING TRIAL, AND OF EXEMPTING OR REFUSING TO EXEMPT A WITNESS FROM THE OPERATION OF THE RULE. SUCH DISCRETION IS REVIEWABLE ON WRIT OF ERROR. CONVICTION OF WITNESS OF ANY CRIME IS ADMISSIBLE TO AFFECT HIS CREDIBILITY. IMPROPER CAUTION TO WITNESS BY THE COURT.

1. The matter of exempting or refusing to exempt a witness from the operation of a rule excluding all witnesses from presence in the court room during the trial, until they are individually called to testify, is largely within the discretion of the trial court, and is not cause for reversal, unless the discretion is flagrantly abused, to the patent prejudice of the party complaining of the ruling.
2. Under the provisions of Section 1097, Revised Statutes of 1892, evidence of the conviction of a witness of any crime is admissible to affect his credibility, and it is error to exclude such evidence from consideration by the jury.
3. At the beginning of the examination of a witness for the defendant, the trial court *sua sponte* remarked to such witness: "Let me warn you, Mr. Burke, that you answer just such questions as you are asked and no more." This was error, since it tended to be an express questioning by the court of the credibility of the witness.

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A writ of error to the Circuit Court for Jackson County.

Judgment reversed.

John H. Carter, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

TAYLOR, J.—The plaintiff in error, hereinafter referred to as the defendant, was tried, convicted and sentenced to ten years imprisonment in the penitentiary for the crime of manslaughter in the Circuit Court of Jackson County, and by writ of error brings this judgment here for review.

At the trial after the witnesses for the State and the defense had been put under the rule excluding them from the court room, until individually called to testify, the defendant's counsel moved the court to exempt one of his witnesses from the rule, and that such witness, who had been the foreman of the coroner's jury that investigated the homicide, be allowed to remain in court with defendant's counsel, to inform him of any discrepancies between the evidence of any of the State's witnesses as deposed at the coroner's hearing and their testimony at the final trial, but the court denied this motion, and this ruling constitutes the first assignment of error.

The matter of exempting or refusing to exempt a witness from the operation of the rule excluding witnesses from remaining in the court room during the trial of a case until they are individually called to testify, is largely within the discretion of the trial court, and is not cause for reversal, unless the discretion is flagrantly abused to

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the patent prejudice of the party complaining of the ruling. Some courts hold that this discretion is not reviewable. *McGuff v. State*, 88 Ala. 147, 7 South. Rep. 35; *Barnes v. State*, 88 Ala. 204, 7 South. Rep. 38; *McClellan v. State*, 117 Ala. 140, 23 South. Rep. 653; *Shaw v. State*, 102 Ga. 660, 29 S. E. Rep. 477. But we prefer the rule as announced by those courts that hold that it is a matter largely within the judicial discretion of the trial court, and that its action in that respect will not be reversed, unless it is made to appear that the discretion was improperly exercised and that it operated to the prejudice of the party complaining of it. *Jackson v. Commonwealth*, 96 Va. 107, 30 S. E. Rep. 452. There was no such abuse of the discretion here, and there is no showing that the ruling complained of resulted in any prejudice to the defendant. On the contrary the defendant announced that he would not call as a witness the party that he desired to be exempted from the rule, upon which announcement the court permitted such party to remain in the court room during the trial to assist the defendant and her counsel in the matters suggested as a reason for his exemption from the rule, and such party was not called as a witness; and alleged discrepancies between the evidence of one witness for the State and his testimony before the coroner's inquest, was attempted to be proved by another member of the coroner's jury.

The second assignment of error involves a ruling of the court exempting a deputy sheriff from the rule excluding the witnesses from the court room. There is no error here. What has been said above as to the first assignment applies equally to this second assignment. No harm is apparent to the defendant from the ruling.

The third error assigned is the refusal of the court to

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permit one A. J. McMullen, an outsider, to remain within the bar of the court room during the trial. We think from what is shown by the record that the court below might very well have permitted this party to have remained within the bar with the defendant's counsel, but the court may have had good reasons for his ruling that are not disclosed by the record, and we can see no substantial harm to the defendant from the ruling. If error it certainly is not reversible error.

After a witness for the State had testified in substance that he and all the rest of the crowd who were at the scene of the melee wherein the homicide was committed had been convicted and fined in a justice's court at Sneads, the State Attorney asked him the following question: "They had all of you up for disorderly assembly didn't they?" Counsel for the defendant then objected to the State Attorney asking what they were up for, on the ground that the State Attorney had objected to his asking the same question. Thereupon the court said that he thought it all to be immaterial, and instructed the jury to disregard any evidence of any conviction at Sneads. To this ruling exception was duly taken, and it is assigned as the fourth error. This ruling was error. Under the provisions of Chapter 4966, Laws of Florida, approved April 30th, 1901, it is provided "That no person shall be disqualified to testify as a witness in any court of this State by reason of conviction of any crime except perjury, but that his testimony shall be received in evidence, under the rules as any other testimony; Provided, however, that evidence of such conviction may be given to affect the credibility of the said witness, and that such conviction may be proved by questioning the proposed

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witness, or if he deny it, by producing a record of his conviction." See Sec. 1097 Rev. Stats. of 1892.

In the case of *Baker v. State*, 51 Fla. 1, 40 South. Rep. 673, this court has held: "That under the provisions of Section 1097 Revised Statutes the general character of a witness, *who has been convicted of any crime*, may be enquired into to affect his credibility." Under the statutes and decision referred to the witness for the State under examination had answered that he and several others of the State's most important witnesses had been convicted and fined for some crime. This affected their credibility, and was properly admitted, and the defendant had the right to have it considered by the jury. And the trial judge erred in excluding it from their consideration.

The fifth assignment is abandoned here.

The sixth assignment is that the court erred in voluntarily instructing a witness for the defendant as follows: "Let me warn you Mr. Burke, that you answer just such questions as you are asked and no more." This was error also. Coming as it did from the bench voluntarily at the beginning of the witness' examination it was calculated to impress the jury with the idea that the judge thought the witness was a "swift" one, and that, therefore, the caution given to him "to answer only such questions as were propounded to him," was necessary to prevent the witness from running away with the truth, and it tended to be an express questioning by the court of the credibility of the witness.

The seventh assignment is abandoned here.

The eighth assignment complains of the ruling of the court instructing the jury to disregard the entire evi-

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dence of a defendant's witness, one L. B. Addison. This also was error. The witness had testified that one of the Donald boys came over to the scene of the homicide very early the next morning after the tragedy looking for a knife, and that he looked for the knife along the west side of the road along the jam of the fence, and that he stayed there a good while. Several of the Donald boys were present at the occurrence of the homicide according to the evidence of other witnesses. We do not agree with the trial court that this evidence was irrelevant and immaterial, and it should not, under the circumstances of the case, have been excluded from the jury.

The ninth and last assignment of error complains of the denial of the defendant's motion for a new trial. As this assignment involves the sufficiency of the evidence to support the verdict, and as there will have to be another trial of the case, we refrain from consideration thereof.

For the errors found the judgment of the Circuit Court is hereby reversed, and a new trial ordered, at the cost of Jackson County.

BROWNE, C. J., AND WHITFIELD, ELLIS AND WEST, J. J.,
concur.

WILL BROWN AND VIRGIL CROFT, *Plaintiffs in Error*, v.
THE STATE OF FLORIDA, *Defendant in Error*.

Opinion Filed November 29, 1920.

Petition for Rehearing Denied December 11, 1920.

1. The granting or overruling of a motion for a bill of partic-

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ulars made by defendant in a criminal case rests largely in the discretion of the trial court.

2. There is no abuse of discretion in denying a motion for a bill of particulars made by defendant in a criminal case in the absence of any showing that a bill of particulars was necessary in the proper administration of justice in such case.
3. Where a defendant in a criminal prosecution testifies as a witness in his own behalf, the State has the right on cross-examination to interrogate him as to whether he has previously been convicted of a criminal offense.
4. It is not reversible error for the trial court to overrule objections to argument of counsel to the jury because such argument is unsound or illogical.

A Writ of Error to the Circuit Court for Suwannee County; M. F. Horne, Judge.

Affirmed.

W. P. Chavous, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WEST, J.—Plaintiff in error Brown and two other persons were indicted in the first count of an indictment on the charge of breaking and entering a store building. the property of another, and plaintiff in error Croft was charged in the second count of the indictment with aiding and abetting the principals named in the first count in the commission of the alleged felony. There was a severance in the court below as to the two parties named

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herein and upon trial they were found guilty as charged. Motion for a new trial was denied and sentence imposed upon each of them. From the judgment writ of error was taken.

An assignment of error was predicated upon the trial court's ruling denying defendant's motion for a bill of particulars.

The indictment is in the usual form in such cases. With the motion for a bill of particulars no attempt was made to show that defendants could not properly prepare their defense or safely proceed to trial without the information requested. It is a bare motion to require the State to furnish defendants with a bill of particulars showing the exact date of the alleged offense, the kinds of goods taken, the quantity of goods taken, the value of the goods taken, and the manner of the alleged breaking and entry of the building from which the goods were taken.

The granting or overruling of a motion of this kind rests largely in the discretion of the trial court, and it is clear that, in the absence of any showing that a bill of particulars was necessary in the proper administration of justice, there was no abuse of discretion in denying the motion in this case. *Branch v. State*, 76 Fla. 558, 80 South. Rep. 482; *Brass v. State*, 45 Fla. 1, 34 South. Rep. 307; *Thalheim v. State*, 38 Fla. 169, 20 South. Rep. 938; 45 Fla. 46.

On Cross examination one of the defendants was asked if he had ever been convicted of a criminal offense. The question was objected to upon the ground that it was irrelevant and immaterial, and the overruling of this objection is made the basis of an assignment of error. There is no merit in this assignment. The object of the

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question was to obtain an admission affecting the credibility of the witness, and it was therefore material. This court has expressly held to the contrary of the contention made on this assignment. In *Squires v. State*, 42 Fla. 251, 27 South. Rep. 864, the court said: "Where a defendant in a criminal prosecution testifies as a witness in his own behalf, the State has the right on cross examination to interrogate him as to whether he has previously been convicted of a criminal offense." *Wallace v. State*, 41 Fla. 547, 26 South Rep. 713; *Clinton et al v. State*, 53 Fla. 98, 43 South. Rep. 312; *Daly v. State*, 67 Fla. 1, 64 South. Rep. 358.

The building charged to have been broken and entered is a store building and there is evidence in the record to the effect that certain shoes and other merchandise were taken from the store which was conducted in the building at the time. Some of the articles, identified as a part of the stock of merchandise contained in the store, were recovered from defendants' possession and were before the jury at the trial. In his argument to the jury the State Attorney used the following language: "Gentlemen, the very idea that these goods here has the cost mark and numbers thereon removed from them is proof that they were stolen." The use of this language was objected to upon the ground that it was not based upon any evidence in the record and was intended to prejudice the jury against the defendants. It does not appear to us that there is anything in the quoted sentence prejudicial to the defendants. There is ample basis for it in the evidence and whether the conclusion sought to be deduced is sound was a question for the jury. The conclusion asserted or inferred does not necessarily follow the statement of fact preceding it, but that was apparent to the

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jury. as much as to the court, and error cannot be successfully predicated upon unsound argument of counsel.

There is sufficient evidence to support the verdict, and as no reversible error is made to appear, the judgment is affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J., concur.

WILLIE M. LOWRY *et al.*, *Appellants*, v. DOWNING MANUFACTURING COMPANY, A CORPORATION *et al.*, *Appellees*.

Opinion Filed November 29, 1920.

Petition for Rehearing Denied December 19, 1920.

1. One of the essential elements to entitle a person by bill of interpleader to be discharged from obligation to persons claiming any part of a fund in his hands who is doubtful as to whom it should be paid, is that he has no interest in the litigation, and only seeks to be relieved of the danger of being molested by the conflicting rights of others among themselves.
2. If the answer to a bill of interpleader denies the allegation in the bill of the amount the complainant alleges that he has in his hands which he is ready to turn over to the court to be litigated among the defendants, the complainant should be put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead, and if the court finds that the complainant has in his hands a sum in excess of the amount which he offers to pay into court, he should be denied the relief prayed and the bill dismissed.

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3. There can be no bill of interpleader, or bill in the nature of a bill of interpleader, when the defendants contest and litigate with the plaintiff himself as to the validity and allowance of a claim set up by himself.
4. When the answer denies the facts upon which the bill depends as a bill of interpleader, the plaintiff is put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead.
5. If the complainant in a bill of interpleader has an interest in the litigation other than to have the fund properly applied or paid to the proper party, the interpleader will not be allowed.
6. A complainant in interpleader cannot adjust his own claims against the matter in controversy, and ask the defendants to interplead as to the remainder.
7. If the amount brought into court is not the difference between the payments and the contract price, but the result of complainant's own adjustment of deductions he thinks should be made, the defendants are entitled to show that in their answers, and while the amount is not an issue to be settled by decree in a strict interpleader, it may be inquired into to ascertain whether complainant can maintain the suit.
8. There can be no lien against the separate statutory property of a married woman for labor done or materials furnished by sub-contractors in the erection of a building on her separate statutory property, with whom she was not in privity.

An Appeal from the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Decree reversed.

Hilton S. Hampton, for Appellants;

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E. B. Drumright and A. B. McMullen, for Appellees.

BROWNE, C. J.—Willie M. Lowry, joined by her husband, S. M. Lowry, brought bill of interpleader against D. C. Walker, with whom they had a contract to furnish all labor and material for the erection and construction of a dwelling house on the separate statutory property of Willie M. Lowry, and against the other defendants who performed labor and furnished material for the erection of the building. The complainants acknowledged an indebtedness to Walker in the sum of \$584.00. The bill contained the essential averments of a bill of interpleader. Decrees *pro confesso* were entered against three of the defendants and the others filed answers. Some of the defendants denied the allegations of the bill that \$584.00 represented the balance due upon the contract, and averred that the complainants were indebted to D. C. Walker, the contractor, a sum of money in excess of the amount alleged in the bill and that such sum equals or exceeds the sum of \$1,500.00.

The answer of another of the defendants denies that \$584.00 is all that is due the contractor from the complainants, and avers that the amount due him is about \$2,000.00.

The answer of D. C. Walker, the contractor, also denies that the complainants are indebted to him only in the sum of \$584.00, but avers that Willie M. Lowry is indebted to him in the sum of \$1,803.00, "less such sums as were necessarily paid in and about the final completion of the work, amounting to not more than \$50.00."

A special master was appointed to take testimony upon the issues made by the pleadings, and upon the coming in of his report, the chancellor rendered his decree in which he found Willie M. Lowry to be a married woman; that

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the property on which the building had been erected was her statutory separate estate; that the contract price for the construction of the building was \$8,650.00, and that they had paid him the sum \$6,847.00, leaving \$1,803.00 in the hands of the complainant. He further found that the complainants had "not sustained their bill, nor shown themselves to be innocent stake holders of the fund tendered into court, but are claimants for certain credits as against the contract price for the construction of said building and claim allowance for certain expenditures which were not part of the contract."

The chancellor thereupon adjudged and decreed that "the complainant, Willie M. Lowry, or some one in her behalf, do pay into the registry of the court within a space of thirty days from date hereof the said sum of \$1,871.52, together with costs of this suit to be taxed by the clerk of this court, and in default whereof the said sum, together with costs to be taxed herein by the clerk, is decreed to be a specific lien and charge against the separate statutory estate of the said complainant, Willie M. Lowry, and specifically against the said premises hereinbefore described, *viz*: Lots 8 and 9 of Beach Place, according to map of plat thereof on record in the office of the clerk of the circuit court of Hillsborough County, Florida, and that the said premises be sold to satisfy this decree."

A bill of interpleader is defined to be, "a bill exhibited where two or more persons severally claim the same debt, duty or thing from the complainant under different titles or in separate interests; and he, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty or deliver the property, is either molested by an action

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brought against him or fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead, and state their several claims so that the court may adjudge to whom the matter or thing in controversy belongs." 23 Cyc. 3.

One of the essential elements to entitle a person to be discharged from obligation to persons claiming any part of a fund in his hands who is doubtful as to whom it should be paid, is, that he has no interest in the litigation, and only seeks to be relieved of the danger of being molested by the conflicting rights of others among themselves. If the answer denies the allegation in the bill of the amount the complainant alleges that he has in his hands which he is ready to turn over to the court to be litigated among the defendants, the complainant should be put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead, and if the court finds that the complainant has in his hands a sum in excess of the amount which he offers to pay into court, he should be denied the relief prayed and the bill dismissed.

The rule is thus stated in *Grass v. Memphis & C. R. Co.*, 96 Ala. 447, 11 South. Rep. 480: "There can be no bill of interpleader, or bill in the nature of a bill of interpleader, when the defendants contest and litigate with the plaintiff himself as to the validity and allowance of a claim set up by himself. Such a rule is at variance with the very nature and purpose of a bill of interpleader. Under such circumstances, the complainant has a personal interest in the result of the suit, directly antagonistic to that of respondents. * * * When the answer denies the facts upon which the bill depends as a bill of interpleader, the plaintiff is put to his proof before the case is

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ready for a decree as to whether the respondents should be required to interplead.”

In the instant case the chancellor found that the complainants had in their hands a sum of money considerably in excess of the amount they offered to pay into court. Upon that finding, the bill should have been dismissed.

If the complainant in a bill of interpleader has an interest in the litigation other than to have the fund properly applied or paid to the proper party, the interpleader will not be allowed. *Southwestern Telegraph & Telephone Co. v. Benson*, 63 Ark. 283, 38 S. W. Rep. 341.

The testimony discloses that the complainants claimed the right to deduct from the amount remaining unpaid to the contractor the sum of \$727.00, the premium on a life insurance policy taken out by Walker through S. L. Lowry, who is an insurance agent. Walker in his testimony denied the obligation, and Lowry's right to deduct it from the balance due him.

It seems well settled that a complainant cannot adjust his own claims against the matter in controversy, and ask the defendants to interplead as to the remainder. *Southwestern Telegraph & Telephone Co. v. Benson*, *supra*.

It has been held that if the amount brought into court is not the difference between the payments and the contract price, but the result of complainant's own adjustment of deductions he thinks should be made, the defendants are entitled to show that in their answers, and while the amount is not an issue to be settled by decree in a strict interpleader, it may be inquired into to ascertain whether complainant can maintain the suit. *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. Rep. 261.

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In the case of *Diplock v. Hammond*, 2 Sm. & Giff. 141, text 145 (65 Full English Reprint, 339), there was a dispute over the amount of the fund. The plaintiffs in the interpleader suit admitted having in their possession 365 pounds, but claimed certain allowances and prayed that the defendants interplead as to the balance, amounting to 325 pounds. The Vice Chancellor said: "I think the circumstance, that this question is raised as to the amount of the fund, deprives them of the right to maintain this as an interpleader suit. Sir J. Leach held that a claim by the stake holder to deduct from the fund in his hands a small sum for warehouse rent prevented him from maintaining a bill of interpleader."

In another English case, *Mitchell v. Hayne*, reported in 2 Simonds and Stewart 63 (1 Eng. Ch. 63), an auctioneer sold an estate for one of the defendants, and another defendant, the purchaser, commenced an action against him for the deposit of the purchase money. The auctioneer filed a bill of interpleader offering to pay into the court the purchase price of the land in his hands, and claimed against both defendants the right to retain his commission and the auction duty, and called upon the defendants to interplead for the balance which he desired to pay into court. It was held that he could not maintain his action if he insisted upon retaining either his commission or the duty.

It seems quite clear that a difference between the debt claimed and the sum the complainant is willing to pay presents an insuperable objection to the prosecution of a bill of interpleader. *Glasner v. Weisberg*, 43 Mo. App. 214; *Willets v. Finlay*, 11 How. Pr. (N. Y.) 468; *Baltimore & Ohio R. R. Co. v. Arthur*, 90 N. Y. 234; Appeal

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of Bridesburg Mfg. Co., 106 Pa. St. 275; Note to Conn. Mut. Life Ins. Co. v. Tucker, 91 Am. St. Rep. 590.

The claims from which Willie M. Lowry sought relief by bill of interpleader were for labor performed and materials furnished by sub-contractors.

In the case of Mary Bell Agin and Harry Agin v. Gainesville Planing & Coffin Company, decided at this term of the court, we held that the separate statutory property of a married woman cannot be charged with a lien of a material man who was not in privity with the owner.

As this question is fully treated in that case, it is unnecessary to repeat the discussion here.

When the instant case was before this court at the January term, 1917 (73 Fla. 535, 74 South. Rep. 525) we held that the bill presented a situation in which the complainants were merely stakeholders having no interest in the fund claimed, and that the essential allegations of a bill of interpleader were found in the bill, and that it was not bad on attack by demurrer. In that case we said:

“If any facts exist, not shown by the bill whose allegations are admitted by the demurrer, which constitute a valid reason why the bill of interpleader should not lie. they are matters of defense and can be set up in the answer.”

It appearing from the answer and the testimony adduced upon the hearing, that there was a dispute as to the extent of the complainants' liability, the complainants could not maintain their bill of interpleader.

Instead of dismissing the bill, the Chancellor ordered

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“Willie M. Lowry, or some one in her behalf,” to pay into the registry of the court \$1,871.52, together with costs, and in default thereof a lien was declared against her separate statutory estate, “and that the said premises be sold to satisfy” the decree.

Under the decision in the case of Agin v. Gainesville Planing & Coffin Co., *supra*, there can be no lien against the separate statutory property of a married woman for labor done or materials furnished by sub-contractors in the erection of a building on her separate statutory property, with whom she was not privy, and the Chancellor erred in decreeing such a lien.

As there could be no decree compelling the defendants to interplead under the facts disclosed in this case, the bill should have been dismissed.

The decree is reversed with directions to dismiss the bill and tax the costs in the lower court against the complainants, and the costs of this appeal against the defendants.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, A CORPORATION, *Plaintiff in Error*, v. HYER LUMBER COMPANY, A CORPORATION, *Defendant in Error*.

Decision Filed November 29, 1920.

A writ of error to a judgment of the Circuit Court within and for the County of Escambia; A. G. Campbell, Judge.

Carr et al. v. City of Kissimmee—Syllabus.

Watson & Pasco, for Plaintiff in Error;

Blount & Blount & Carter, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

AGNES A. C. CARR AND HER HUSBAND, W. J. S. CARR, *Appellants*, v. THE CITY OF KISSIMMEE, FLORIDA, A MUNICIPAL CORPORATION, *Appellee*.

Opinion Filed November 29, 1920.

1. The method of paying for paving improvements is a matter of legislative discretion, and when it is prescribed in the act authorizing the improvements that the assessment shall be made under what is known as the "front foot" rule, an assessment based on a different rule is invalid.
2. A city council has no authority to adopt a rule for apportioning the expense of paving, different from that expressly designated in the statute, and when a different rule is adopted, the assessment is invalid.

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An Appeal from the Circuit Court for Osceola County,
C. O. Andrews, Judge.

Order reversed.

Johnston & Garrett, for Appellant;

Lewis O'Bryan, for Appellee.

BROWNE, C. J.—This case involves the validity of a paving assessment levied by the City of Kissimmee on property belonging to the appellants under the provisions of a special act of the legislature, Chapter 6361, Laws of Florida, 1911.

The demurrer contains a number of grounds, but it may be considered as presenting but two questions:

(1) That the bill does not show that all the acts have been done and all times transpired, required by the statute, up to the time of filing the lien for the paving assessment; and

(2) That the council in determining the amount that abutting owners should pay for paving, adopted a different method from that provided by the statute, and that the assessment is therefore unenforceable.

Section 8 of the special act provides that the paving liens may be enforced by bill in equity or by a suit at law. It further provides that: "The bill in equity or the declaration shall set forth briefly and succinctly, the issuance of the certificate of indebtedness issued on account of such lien, the amount thereof, and the description of the property upon which such lien has been acquired and against which such certificate of indebtedness

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was issued, and shall contain a prayer that the owner shall be compelled to pay the amount of said lien, or in default thereof, that the said property shall be sold to satisfy the same.

The bill contains all these averments. This being a statutory remedy we cannot say that the bill is bad because it fails to set forth all the things that the city council was required to do and perform prior to filing the lien for the assessment.

The next question is, does the bill show a different method of apportioning the cost of the paving than that provided for in the statute? We think it does.

Section 1, of the special acts, provides that "the council shall, as soon as the cost of such improvement shall have been ascertained, assess against the abutting property two-thirds of the cost of such improvement in proportion to the length of such abutting property on such street or alley so improved." This is what is known as the "front feet" rule. There are various methods of paying for street improvements. They may be paid for out of the general treasury, or assessed against the abutting property, and if in the latter manner, may be proportioned according to the area of the lot, or its frontage. The expense of the entire work may be charged against the abutting property, or the city may pay part and charge part of it to the abutting property; it may charge each piece of property with its proportion of the cost of the improvements immediately abutting it, or it may apportion the expense of the entire paving among the owners of all the abutting property in proportion to the number of front feet of each piece. Each of the various methods has its advocates, but it is not for us to deter-

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mine which is the fairer method, as it is settled in this State that these are matters of legislative discretion, and that the method provided for in the special act known as the "front foot" rule is "a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject." *Anderson v. City of Ocala*, 67 Fla. 204, 64 South. Rep. 775.

The special act that authorized and empowered the City of Kissimmee to make street improvements specifically laid down the method to be adopted in apportioning the cost of the work. The allegation of the bill on this subject is as follows:

"Complainant further alleges that the said City of Kissimmee, has caused to be made on Clyde Avenue and abutting the property hereinabove described, the following improvements, to-wit: 296-Square Yards of Vitrified Brick Paving, and that said improvements have been completed and due notice of the cost thereof and of the intention of the said City of Kissimmee to claim a lien for the proportionate cost thereof having been established by the issuance of a certificate of indebtedness, which has duly been registered in the City Lien Book, in accordance with the provisions of said Special Act, as hereinbefore set forth, and the Council of the said City of Kissimmee having on the said 28th day of June, A. D. 1912, assessed against the hereinabove described property abutting upon said street, the just proportion of the cost of said improvements, same being the proportionate cost upon the real estate hereinbefore described, and being in the sum of \$186.48; as will more fully appear by reference to the original certificate of indebtedness No. 40, attached hereto, marked Exhibit 'A,' and a certified copy of minutes

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of City Council of the City of Kissimmee, marked Exhibit 'B,' and made a part of this bill of complaint."

The statute requires the assessment to be made upon the basis of the number of feet of frontage of each lot, and it appears from the bill that a different basis was adopted, and the owner of the lot was assessed for "296 Square Yards of Vitrified Brick paving," instead of his proportion of two-thirds of the entire cost, in proportion to the length of his abutting property, as required by the statute.

The city council had no authority to adopt a rule for apportioning the expense of the paving, different from that expressly designated in the statute, and it appearing from the bill that a different rule was adopted, the assessment is void, the bill is without equity, and the demurrer to it should have been sustained.

Order reversed.

TAYLOR, ELLIS AND WEST, J. J., concur.

WHITFIELD, J., dissents.

WHITFIELD, J., dissenting.—I do not understand from the bill that it shows a rule of assessment against abutting property different from that fixed by the statute was adopted or applied by the municipality.

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AGNES A. C. CARR AND HER HUSBAND, W. J. S. CARR,
Appellants, v. THE CITY OF KISSIMMEE, *Appellee*.

Opinion Filed November 29, 1920.

1. When the method and procedure for the enforcement of a lien for sidewalk construction is prescribed in the act authorizing the improvements, the city is bound to follow the method and procedure prescribed, and the failure to do so makes an assessment for such tax unenforceable.
2. A resolution of a city council when it expresses only the intention of the city, cannot be reformed in equity.
3. Sales made by operation of law, in which the owner of the land does not participate, and in which there can be no mutual mistake, and deeds issued by virtue of such sales are not subject to reformation.
4. A tax certificate issued by a city is not such an instrument that a court of equity may reform.

An Appeal from the Circuit Court for Osceola County;
C. O. Andrews, Judge.

Decree reversed.

Johnston & Garrett, for Appellants;

Lewis O'Bryan, for Appellee.

BROWNE, C. J.—This proceeding seeks to enforce a lien for the construction of sidewalks abutting two lots in the City of Kissimmee belonging to Agnes A. C. Carr.

The bill alleges among other things that the City of Kissimmee "Issued a certificate of indebtedness against

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the following real estate owned by the defendant Agnes A. C. Carr, to-wit: Lots 1 and 2 of Block 'EE' of W. A. Patrick's Addition to the City of Kissimmee, according to the plat thereof on file in the office of the Clerk of said county." The bill further alleges "that through oversight or error the form of certificate of indebtedness for paving was used instead of the form for sidewalk providing for the assessment of the entire cost of sidewalk against the abutting property and same entered in the City Lien Book in accordance with law. That one certificate should have been issued assessing the entire cost of sidewalk against Lot 1 of Block 'EE' in the sum of \$72.18, and one certificate assessing the entire cost of sidewalk against Lot 2 of Block 'EE' in the sum of \$74.60."

The bill prays for a foreclosure of the lien and also "that the certificate of indebtedness herein above referred to be reformed to speak the truth and in accordance with the facts as herein above set out and evidenced by the certified copy of the minutes of the City Council of the City of Kissimmee, herein above referred to, and marked Exhibit A, and a separate lien declared against each lot."

The sidewalks were constructed by the city under the authority of Chapter 6361, Laws of Florida, 1911. Section 4 of the Act provides that the council "shall issue certificates of indebtedness for the amount so assessed against the abutting property, a separate certificate to be issued against each tract of land assessed." In including both lots in one certificate, the city acted in violation of the special act which requires "a separate certificate to be issued against each tract of land assessed." A failure to comply with this provision of the law is set up in the bill filed by the city for the foreclosure of its lien, and it is admitted in the brief of counsel for appellee. The

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city was bound to follow the method and procedure prescribed in the special act, and its failure to do so in this instance makes the assessment unenforceable. See *Town of Kissimmee City v. Drought*, 26 Fla. 1, 7 South Rep. 525; *Town of Kissimmee City v. Cannon*, 26 Fla. 3, 7 South. Rep. 523; *Parker v. City of Jacksonville*, 37 Fla. 342, 20 South Rep. 538.

The bill, however, seeks to avoid the effect of the error in issuing but one certificate by asking for its reformation.

It is well settled that a mistake that can be corrected in equity must be mutual. For a full collection of authorities on this subject, see *Notes to Williams v. Hamilton*, 65 Am. St. Rep. 475. It has therefore been held, that a resolution of a city council when it expresses only the intention of the city, cannot be reformed in equity. *Carskaddon v. City of South Bend*, 141 Ind. 596, 39 N. E. Rep. 667.

For the same reason, sales made by operation of law, in which the owner of the land does not participate and in which there can be no mutual mistake, and deeds issued by virtue of such sales, are not subject to reformation. *Rogers v. Abbott*, 37 Ind. 138; *Keepfer v. Force*, 86 Ind. 81; *Batelle v. Knight*, 23 S. Dak. 161, 120 N. W. Rep. 1102, 20 Ann. Cas. 456 and *Notes*.

There could of course be no mutuality between Mrs. Carr and the city whose officials made the certificates of indebtedness, in the making of which she did not participate, and the transaction is lacking in that quality that is essential before a court of equity can grant its relief.

Our conclusion is that the certificate that is the basis of the city's cause of action, is void, and that it is not such an instrument that a court of equity may reform.

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It follows, therefore, that the bill is without equity, and the demurrer to the bill should have been sustained.

The decree is reversed.

TAYLOR, ELLIS AND WEST, J. J., concur.

WHITFIELD, J., dissents.

WHITFIELD, J., dissenting—The certificates in this case are not tax deeds but are mere statutory evidences of indebtedness for sidewalk improvements, and a mere error in making one certificate cover the indebtedness of the same owner for two lots, if material, may be corrected under the supervision of a court of equity in the absence of other remedy afforded by law. A “lot” may not be a “tract” within the meaning of the statute. It is the duty of the city officials to make proper certificates and mere errors in making the certificates do not affect the liens of the city. Equity regards substance rather than form. Equity regards that as done which ought to be done. Equity having jurisdiction of the subject *and* of the parties will do complete justice in the premises.

Where the statutory liens of a municipality for local improvement special assessments are to be enforced, equity may incidentally permit a statutory duty to be properly performed in evidencing the indebtedness for which the liens are given. See 5 McQuillin Mun. Corp. p. 4486; 86 Mo. 451; 64 Mo. App. 207.

Dayton v. Patton—Syllabus.

JOHN F. DAYTON, *Appellant*, v. J. W. PATTON, *Appellee*.

Opinion Filed November 30, 1920.

1. In a suit in equity to remove an alleged cloud from and quiet title to certain land where both complainant and defendant claim title to the land in controversy from a common source, it is not incumbent upon complainant to trace his title further than to such common source of title.
2. In proceedings to remove a cloud from and quiet title to certain land the complainant must show with clearness, accuracy and certainty the validity of his own title and the invalidity of the title of the opposing party.
3. Where there is such an insufficiency of testimony as to preclude making a just decree, and the points are covered by the pleadings, and are such that there can be no doubt that testimony exists as to them, the cause will be remanded with directions to take further testimony on such points.

An Appeal from the Circuit Court for Alachua County;
J. T. Wills, Judge.

Reversed.

Hampton & Hampton, for Appellant;

Thomas W. Fielding and *W. S. Broome*, for Appellee.

WEST, J.—This is a suit in equity to remove an alleged cloud from and quiet the title to certain land situate in Alachua County described in the bill. By an amended bill it is alleged that complainant is the owner and in the actual possession of the land described; that his possession consists of his residence upon and cultivation of such land.

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The alleged cloud upon complainant's title, according to the allegations of the bill, consists of a sheriff's deed to defendant issued upon a sale of the land described as the property of a predecessor in title of complainant under an execution issued upon a judgment against such owner.

The answer in terms denies the allegations of each paragraph of the bill seriatim and demands strict proof thereof.

Evidence was taken before an examiner duly appointed for that purpose and upon a hearing thereon final decree was entered adjudging the equities to be with the defendant and dismissing the bill. Complainant thereupon employed other counsel who filed a petition for rehearing. Rehearing was denied and an appeal to this court was entered from the final decree and from the order denying the petition for rehearing.

The alleged cloud upon complainant's title which he seeks by this proceeding to have removed is described in the ninth paragraph of the bill. This paragraph is as follows: "That on January 11th, A. D. 1916, there was execution issued on the said judgment against the said Robert L. Steele, Jr., and on the seventh day of February, A. D. 1916, there was what purports to be a sale of the said lands as described in Paragraph One of this bill, and as set out in the writ of attachment, by P. G. Ramsey, as sheriff of Alachua County, Florida, at public outcry at the court house in said county, and that the said 160 acres of land was purported to be sold to J. W. Patton, defendant herein, for the small sum of \$10.00 and that a sheriff's deed was executed therefor by the said P. G. Ramsey, as sheriff, to the said J. W. Patton on the 23rd day of February, A. D. 1916, and filed for record on the tenth day of February, A. D. 1917, all of which appears on the public

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records of the office of the Clerk of the Circuit Court of Alachua County, Florida, in deed book 99, on page 612; but the said J. W. Patton, defendant herein, or any one for him, has foreborne to sue complainant, or his grantors, the said S. P. Thompson and Jay P. Thompson, or otherwise bring any suit to test the sufficiency of his sheriff's deed, nor to eject this complainant, or his grantors, from said lands, although this complainant and his grantors have been in actual possession of said lands ever since and long before the execution of the said sheriff's deed and was in possession of said lands at the time of the filing of the writ of attachment against said lands and at the time of the sale and execution of said deed."

By appropriate allegations complainant derails title to the land by several mesne conveyances from Steele, the judgment debtor named in the quoted paragraph of the bill, to himself, and the allegations of the bill of conveyances from Steele to complainant were proved. Since Steele was the judgment debtor in the judgment upon which the land was sold to defendant, his (defendant's) claim of title to the land may be said to have originated in Steele, hence Steele became, as to the parties to this suit, a common source of title. *Doyle v. Wade et al.*, 23 Fla. 90, 1 South. Rep. 516. In this situation the defendant will not be heard to deny the validity of Steele's title, and it was not incumbent upon complainant to trace his title further back than this common source. *Rhodus & Fleming v. Heffernan et al.*, 47 Fla. 206, 36 South. Rep. 572; *Mansfield & Bishop v. Johnson* 51 Fla. 239, 40 South. Rep. 196. With proof of possession by complainant, which was also made, the validity of his title was *prima facie* established.

But in this class of cases the complainant's right to

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recover depends not only upon proof of a valid title in complainant to the land involved, but also upon the invalidity of defendant's title. *Levy v. Ladd*, 35 Fla. 391, 17 South. Rep. 635; *Houston v. McKinney*, 54 Fla. 600, 45 South. Rep. 480; *Jarrell v. McRainey*, 65 Fla. 141, 61 South. Rep. 240; *Hill v. DaCosta*, 65 Fla. 371, 61 South. Rep. 750. Therefore, the final decree in favor of defendant must have been predicated upon the absence of proof of facts showing the invalidity of defendant's claim of title.

From the allegations of the bill it appears that Steele, who as we have seen, is a common source of title, conveyed the land involved to S. P. Thompson and J. P. Thompson on December 1, 1914, and while this deed of conveyance was not recorded until March 27, 1915, it is alleged and proved that the grantees went into actual possession of "all of the said lands" on December 8, 1914, "living on and cultivating said land," under the deed from Steele, and continued such possession until March 16, 1917, when it was sold and conveyed by them to the complainant, who on the day of the conveyance to him went into actual possession of "all of the said lands" and has ever since "lived on and cultivated same" under said deed. It also appears from the allegations of the bill that the judgment against Steele, upon which the execution issued which was levied upon the land by the sheriff and the land sold to defendant, was "filed" in the office of the clerk of the circuit court on May 4, 1915; but it is also alleged that there was on February 8, 1915, "attempted to be filed" in the office of the clerk of the circuit court a writ of attachment embracing the land described in the bill, said "attempted writ of attachment" being recorded in Lien Book Number 4 on page 8 of the public records of the county, and that on February 23,

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1915, there was "filed" in the said office "what is purported to be a second, or amended writ of attachment, embracing the same lands."

Assuming that these statements with respect to the "filing" of the writs of attachment are equivalent to an allegation that such writs were levied upon the land described upon the date or dates stated, still the conveyance by Steele, the judgment debtor, to the Thompsons, complainant's predecessors in title, ante-dates such attachments, and Steele therefore had no title to the land when it was levied upon as his property. Neither was he in possession of the land, the allegation of possession by the Thompsons at that time being amply supported by the evidence. This being true, the sale and conveyance of the land by the sheriff to the defendant under the execution issued upon such judgment was *prima facie* ineffectual to convey any title to him.

There was, however, a failure upon the part of complainant to offer in evidence proof which apparently was available to show the invalidity of defendant's title. The sheriff testified as a witness for complainant that he did make sale of the property under this execution, but since neither writ of attachment with the return of the sheriff thereon showing the date of its levy, nor any subsequent proceedings in the suit, nor the deed sought to be cancelled as a cloud upon complainant's title was offered in evidence, the proof on this branch of the case was insufficient. But as it appears from the allegations of the bill that the facts tending to impeach the validity of defendant's title are matters of record, it would have been proper, when the case came on for final hearing, for the chancellor to refer it back to the examiner with di-

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rections that testimony be taken upon that point before finally passing upon the case.

In several instances in which similar situations were presented, in order that substantial justice might be done, this court has reversed decrees and remanded cases for the taking of further testimony. In *Fuller v. Fuller*, 23 Fla. 236, 2 South. Rep. 426, speaking through Mr. Justice RANEY, the court said: "Where there is such an insufficiency of testimony as to preclude making a just decree, and the points are covered by the pleadings, and are such that there can be no doubt that testimony exists as to them, the cause will be remanded with directions to take further testimony on such points." See also *Graham v. Fla. Land & Mortgage Co.*, 33 Fla. 356, 14 South. Rep. 796; *Morgan v. Dunwoody*, 66 Fla. 522, 63 South. Rep. 905.

The decree is reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

Reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

D. R. McQUAGGE, *Plaintiff in Error*, v. THE STATE OF
FLORIDA, *Defendant in Error*.

Opinion Filed November 30, 1920.

1. A judgment of conviction will not be reversed even if technical errors have been committed in rulings on questions of the admissibility of evidence or in charges given or refused

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or in other matters of procedure where the evidence of guilt is clear and no fundamental rights of the defendant have been violated.

2. Chapter 7263, Acts of 1917, Laws of Florida, and prior statutes of a similar character have in several cases been assumed by this court to be valid and enforceable and a sufficient basis for a criminal prosecution against persons alleged to have violated the provisions of such statutes.
3. Even if it should be held that the rule obtains in this State which permits the question of the constitutionality of a statute upon which a criminal prosecution is based to be raised for the first time in the appellate court, it is not so clearly made to appear that the statute which is the basis of the prosecution in this case is in contravention of any designated provision of the Constitution as to warrant a holding that the statute is invalid.

A Writ of Error to the Circuit Court for Jackson County; C. L. Wilson, Judge.

Affirmed.

Jefferson D. Stephens, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *Worth W. Trammell*, Assistant, for the State.

WEST, J.—The writ of error in this case was taken to a judgment of conviction of defendant upon a charge of issuing a check to another in payment for certain goods and chattels, the title and possession of which were thereupon transferred to him upon the faith of the payment of such check, the said defendant not at the time of issuing and giving said check or the presentation of the same having sufficient money on deposit in the bank on which

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it was drawn and to which it was presented to pay the same, nor within twenty-four hours after written notice of the presentation and non-payment of such check making full restitution by returning the goods and chattels received therefor.

There are a number of assignments of error based upon rulings admitting evidence on behalf of the State and refusing to admit certain proffered evidence on behalf of defendant and upon certain instructions given by the court to the jury and the refusal of the court to give certain other instructions requested on behalf of defendant.

To discuss the various questions raised would consume considerable time without any corresponding benefit. Nothing is contained in any of them which may not be determined by the application of well settled principles, and we have been unable to discover in any of the rulings complained of any error which may be regarded as so prejudicial to the defendant's rights as to require a reversal of the judgment.

The rule in this jurisdiction is that a judgment of conviction will not be reversed even if technical errors have been committed in the rulings on questions of the admissibility of evidence or in charges given or refused or in other matters of procedure where the evidence of guilt is clear and no fundamental rights of the defendant were violated. *Dixon v. State*, 79 Fla. 586, 84 South. Rep. 541; *Settles v. State*, 75 Fla. 296, 78 South. Rep. 287; *Seymour et al v. State*, 66 Fla. 133, 63 South. Rep. 7. There is ample evidence in the record to support the verdict of conviction, and the various questions raised upon the rulings of the trial court complained of may be disposed of by an application of this rule adversely to defendant.

Barnes v. Reedy—Decision of Court.

It is contended in the brief in behalf of defendant that the statute (Chap. 7263, Acts 1917, Laws of Florida) upon which the prosecution is predicated, is unconstitutional. So far as the record discloses, this question was not directly presented to and passed upon by the trial court, and while not directly considered, this court has in several cases assumed that the statute is valid and enforceable. *Wolfe v. State*, 76 Fla. 168, 79 South. Rep. 449; *Denton v. State*, 66 Fla. 87, 62 South. Rep. 914; *Whitney v. State*, 63 Fla. 53, 58 South. Rep. 230; *Ryan v. State*, 60 Fla. 25, 53 South. Rep. 448. And even if it should be held that the rule obtains in this State which permits the question of the constitutionality of a statute upon which a criminal prosecution is based to be raised for the first time in the appellate court, it is not so clearly made to appear that the statute which is the basis of the prosecution in this case is in contravention of any designated provision of the Constitution as to warrant a holding that the statute is invalid.

No error having been made to appear, the judgment will be affirmed.

TAYLOR, WHITFIELD AND ELLIS, J. J., concur.

BROWNE, C. J., concurs in result.

F. O. BARNES, *Appellant*, v. W. A. REEDY, *Appellee*.

Decision Filed November 30, 1920.

An Appeal from a decree of the Circuit Court within and for the County of St. Lucie; E. B. Donnell, Judge.

Makinson et al. v. Mach et al.—Decision of Court.

A. D. Penney and R. H. Seymour, for Appellant;

Floyd & Fee, for Appellee.

PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

W. H. MAKINSON, JOHN S. CADEL AND C. L. BANDY, AS TRUSTEES KISSIMMEE LODGE No. 1485, LOYAL ORDER OF MOOSE OF THE WORLD, *Appellants*, v. ERNEST MACH AND EMIL MACH, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MACH BROTHERS, *Appellees*.

Decision Filed December 1, 1920.

An Appeal from an order of the Circuit Court within and for the County of Osceola; Jas. W. Perkins, Judge.

Milton Pledger and Lewis O'Brien, for Appellants;

Johnston & Garrett, for Appellees.

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PER CURIAM.—This cause having heretofore been submitted to the Court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
CONCUR.

ELLIS, J., dissents.

A. W. DANNELLY, *Plaintiff in Error*, v. THE STATE OF
FLORIDA, *Defendant in Error*.

Opinion Filed December 2, 1920.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT RAPE—GRAVAMEN OF THE CRIME IS THE INTENT WITH WHICH THE ASSAULT IS MADE—VOLUNTARY DESISTENCE FROM THE ASSAULT BEFORE CONSUMMATION, WITHOUT OUTSIDE INTERFERENCE AND WITH NO UNUSUAL RESISTANCE ON THE FEMALE'S PART PREVENTS CONVICTION.

1. The gravamen of the crime of assault with intent to commit rape is the *intent* with which the assault is made. The *intent* in such cases must be shown by the State to have so

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possessed the accused that his determination was to consummate the rape, regardless of resistance and want of consent.

2. A conviction of the crime of assault with intent to rape will not be sustained upon proof that the assailant voluntarily desisted before consummation, without any outside interference; and with no unusual resistance on the female's part.
3. Where the testimony shows that a series of indecent assaults were made, but not with the necessary intent to commit rape by force and without the female's consent, but rather with the intent to induce her consent, and on being convinced that he cannot obtain such consent the defendant voluntarily desists from his attempts without any outside interference, and without any unusual resistance on the female's part, there can be no legal conviction.

A writ of error to the Circuit Court for Walton County.

Judgment reversed.

Walter Kehoe and Forsyth Caro, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

TAYLOR, J.—The plaintiff in error, hereinafter referred to as the defendant, was convicted and sentenced to imprisonment for two years in State's prison in the Circuit Court of Walton County for the crime of assault with intent to rape, and by writ of error brings such judgment here for review.

From the conclusion which we have reached upon consideration of the record in the case it becomes unnecessary to pass upon any of the errors assigned, except that

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of the denial of the defendant's motion for new trial, made upon the ground that the verdict of conviction is not warranted by the evidence in the case. The chief and only eye-witness of the occurrence of the State was Stella Bishop, the prosecutrix. The substance of her testimony was as follows: That she was eighteen years of age; that her father was dead, and that she lived with her mother; that she had known the defendant for a year; that he, the defendant, came to her house about three o'clock in the afternoon in a car, about the 21st of April, 1920, on Wednesday. Mrs. Adkinson was with him. That Mrs. Adkinson resided close to and in sight of her residence. They got out of the car and came in to our house. Mrs. Adkinson called to us and said: "Come let us go and look at the new road." In a few minutes I came down from upstairs, the defendant said: "Come, Stella, let's go look at the new road, dont go to fixing up, I am in a hurry; there ain't nobody going but me and you Stella, the widows can stay here." This was said while I was in the house. Then he and I went out and got in the car and started off in the direction of the Boggy road, just me and Mr. Dannelley. We both sat on the front seat. About the time we left he hugged and kissed me. We were about half a mile from the house. He hugged and kissed me and felt my breast and pulled up my dress. I told him if he was going to do that way to stop the car and I would go back. He laughed at me and asked if I had not heard of Wash Dannelley before. He went on down the road and kept trying to kiss me, and I told him to stop the car. I was doing everything I could to keep him from it. After we got down the road a piece he turned out and went into the woods. When we were coming back we saw some people at Mr. Gaskins' camp. When we saw them he told me to straighten up that right eye and look pert. I had

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been crying because of what he had done. He drove faster as he passed these people. I asked him to let me out of the car there, but he would not do it. When we got off the road about a hundred yards where nobody could see me he stopped the car. He drove over stumps, trees and logs. I thought he would turn the car over. He stopped the car and said he was G-d damn sure going to have it. If I wouldn't give it to him he would rape me. He got up from where he was sitting and got down over me and said he was going to have it anyway. He told me I was the G-d d-mst girl he ever saw—couldn't stand for his hands to be laid on me. I was doing everything I could to keep him off of me. I was fighting him and kicking him. He got pretty close to me. He told me to be d-mnd sure I didn't wear any pants the next time I went riding with him. He pulled up my dress and put his hand on my throat. He had his other hand on his pants like he was going to unbutton them. He pulled up my dress and put one hand under my dress and told me he was G-d d-md sure going to do it to me. He put his legs up against mine, his knees, and pushed mine apart. I was trying to fight and to kick him. He tried to unbutton my clothes, but didn't unbutton them. I did not know whether I used my mouth or not. I told him to stop and hallooed out three or four times. He told me to hush. I tried to tighten my legs. I tried to kick him. I kicked him all I could only he was holding me down. I did not get out of the car there. He wouldn't let me. He did not have intercourse with me. I didn't give any consent to have intercourse with me. All of these actions were against my will. I didn't give him consent to these actions or doings of Mr. Dannelley. I didn't want him to do it. When we left there we came back the way we had come and went over the new road. He stopped several times on the way

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and hugged me and kissed me. We came by an old house and he said: "You are going in that old house with me." I told him I was not; then he said there is a G-d d-mn shade hanging in that window and I believe somebody lives there. Before he saw the shade he said he was going to do it to me after he got me in there. I told him he wouldn't as long as I could help myself. When I was down in the woods before we started back I hallooed and kicked to prevent him from having intercourse with me, and I was crying. It was about a quarter of a mile to the nearest house, Mr. Umbrose. I couldn't see the house from the road for the bushes and trees. This was in Walton County, Florida, about three o'clock in the afternoon, Wednesday, the 21st day of April, 1920. We then went back to Mrs. Adkinson's. I got out there that evening, went in and got a drink of water and I said I was going home, and went home. Mr. Dannelley had gone on. Two days later I saw Mr. Dannelley. He came down to Mrs. Adkinson's, where I was. He came in and spoke to me. I was sitting in the swing. He sat down in the rocker and pulled his chair close up to me trying to talk to me. He said he had brought a message to me and did I want to hear it. I said, "I don't care to." He got up and went into the house and I went in with him. He told me he knew he had done wrong and he was sorry for it. I told him he was liable to be sorrier of it later if he did not mind out.

Cross-examined, she said in substance: He was in sight of our house when he first started to hug and kiss me, probably half a mile. He stopped the car two or three times and put his hands under my clothes, and said he was going to do it to me. Just stopped the car a few minutes. He done this two or three times. He kept on hugging me and kissing me and putting his hands under my

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dress. We were about two miles from home on the Boggy road when he turned off and went into the bushes near a branch. When he got down there he said he was going to do it to me. I was still in the car, never got out. He had one of his hands on my breast, and the other hand on himself like he was going to unbutton his pants. After he got through down there he put one hand under my dress and pulled it up. I had on my underskirt and drawers. My drawers were buttoned up. He did not unbutton them, nor did he try to unbutton them, nor did he break the buttons off. My drawers never came off, nor were unbuttoned and he did not have sexual intercourse with me. The only thing I did was to kick and push him. I don't know how long after he quit trying to have intercourse with me before we started the car up again. He begged me to do it as we drove off. We came back the same road we went. From then on he didn't try to do anything, but kept on trying to hug and kiss me.

In several cases this court has held that the gravamen of the crime of assault with intent to commit rape is the *intent* with which the assault is made; and that the intent in such cases must be shown by the State to have so possessed the accused that his determination was to consummate the rape regardless of resistance and want of consent. *Hunter v. State*, 29 Fla. 486, 10 South. Rep. 730; *Clark v. State*, 56 Fla. 46, 47 South. Rep. 481; *Bell v. State*, 61 Fla. 6, 54 South. Rep. 799. And in the case of *Rushton v. State*, 58 Fla. 94, 50 South. Rep. 486, we have held that "a conviction of assault with intent to rape will not be sustained upon proof that the assailant voluntarily desisted before consummation, without suggestion of outside interference and with no unusual resistance on the woman's part. The testimony of the prosecutrix in this case shows that a highly indecent series of assaults were

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made by the defendant upon her, but it does not make out the necessary *intent* on the assailant's part to sustain the conviction had. It tends rather to show that his intent was to obtain her consent to his intercourse, and that when he became convinced that he could not obtain such consent he voluntarily desisted without any outside interference, and without unusual resistance upon her part. From this conclusion it follows that the court below erred in the denial of the defendant's motion for new trial on the ground that the verdict was not warranted by the evidence.

The judgment of the Circuit Court in the case is hereby reversed at the cost of Walton County.

BROWNE, C. J., AND WHITFIELD, J., concur.

ELLIS AND WEST, J. J., dissent.

LINUS WILLIAMS, BEULAH DANIELS, MYRTLE TREADWELL
AND OLNEY PARKER, HEIRS OF M. L. WILLIAMS, *Appellants*, v. L. L. MORGAN, *Appellee*.

Decision Filed December 3, 1920.

An Appeal from a decree of the Circuit Court within
and for the County of DeSoto; John S. Edwards, Judge.

Leitner & Leitner, for Appellants;

Arthur F. Odlin, for Appellee.

Serkissian et al. v. Newman—Decision of Court.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

AMY M. SERKISSIAN, A MARRIED WOMAN AND INSANE PERSON, JOINED BY HER HUSBAND, FRED P. SERKISSIAN, ALIAS FRANK P. SERKISSIAN AND BY HER GUARDIAN *ad litem*, WALLACE TERVIN, AND FRED P. SERKISSIAN, ALIAS FRANK P. SERKISSIAN, IN HIS OWN RIGHT, *Appellants*,
v. BENJAMIN B. NEWMAN, *Appellee*.

Decision Filed December 3, 1920.

Petition for Rehearing Denied February 10, 1921.

An Appeal from an order of the Circuit Court within and for the County of Manatee; F. M. Robles, Judge.

John B. Singletary, for Appellants;

G. B. Knowles, for Appellee.

PER CURIAM.—This cause having heretofore been sub-

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mitted to the Court upon the transcript of the record of the order aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and adjudged by the Court that the said order of the Circuit Court be, and the same is hereby, affirmed.

All concur.

JOHN FORD, *Plaintiff in Error*, v. THE STATE OF FLORIDA,
Defendant in Error.

Opinion Filed December 3, 1920.

1. An indictment alleging that the accused did "unlawfully break and enter a building of another, to-wit: a cotton house, the property of C., with intent to commit a felony, to-wit: grand larceny," sufficiently charges the statutory offense, and the defendant could not have been misled or embarrassed by the charge as made. The building is sufficiently described. An intent to commit a felony is alleged. The property intended to be stolen need not be described.
2. Where there is sufficient evidentiary basis for charges given, and no material errors of law appear therein, a mere failure to charge on circumstantial evidence will not cause a reversal of a judgment of conviction, no charge on that point having been requested.
3. Where the evidence is legally sufficient to sustain the verdict, and errors of procedure, if any, are harmless, the judgment will be affirmed.

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A Writ of Error to the Circuit Court for Suwannee County; M. F. Horne, Judge.

Judgment affirmed.

John F. Harrell, for Plaintiff in Error;

Van C. Swearingen, Attorney General, and *D. Stuart Gillis*, Assistant, for the State.

WHITFIELD, J.—Upon an indictment charging that John Ford “did unlawfully break and enter a building of another, to-wit, a cotton house, the property of one J. D. Clinton, with intent to commit a felony, to-wit, grand larceny,” he was convicted and took writ of error.

The indictment sufficiently described the building alleged to have been broken and entered. See *Rimes v. State*, 36 Fla. 90, 18 South. Rep. 114. Grand larceny is a felony. It is the larceny of personal property of \$20.00 or more in value. It was not necessary for the indictment to describe the property, the intent to steal which accompanied the breaking and entering. The indictment sufficiently alleged the statutory offense.

The defendant could not be misled by the allegations of the indictment or embarrassed by the allegations in concerting his defense.

No material or harmful errors appear in the charges given. See *McDonald v. State*, 56 Fla. 74, 47 South. Rep. 485, and authorities there cited. *Miller v. State*, 76 Fla. 518, 80 South. Rep. 314. There was sufficient evidentiary basis for the charges given. No charge on circumstantial evidence was requested, and the law of the case did not

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require such charge to be given by the court of its own motion.

The transcript of the bill of exceptions shows the following:

"The jury retired to consider their verdict. After remaining in the jury room for about the space of two hours, they returned into the court room and announced that they could not agree, but did not ask for additional instructions; but the court on its own motion gave the following charge:

"Some jury has got to decide this case and I might as well let you decide it as some other jury, and I am going to ask you to further deliberate and find a verdict if you can. You may now separate until morning, and in the meantime you shall not discuss this case with any one, or let any one talk to you about it. You shall get back to your room as early as you can tomorrow morning and try to reach a verdict. If this defendant is guilty and you believe him guilty from the evidence, beyond a reasonable doubt, then you find him guilty; if you believe he is not guilty from this evidence or you have a reasonable doubt of his guilt, then find him not guilty.'"

No error appears in this procedure of which the defendant can justly complain.

There is evidence legally sufficient to support the verdict, and errors, if any, in admitting testimony were harmless. Counsel for the plaintiff in error has forcefully argued the points reserved in the record, but no material errors are made to appear.

Judgment affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J. concur.

The B. L. & L. Co. v. Moneyway—Syllabus.

THE BAGDAD LAND & LUMBER COMPANY, A CORPORATION,
Plaintiff in Error, v. C. L. MONEYWAY, *Defendant in Error*.

Opinion Filed December 3, 1920.

1. "When the driver of an automobile attempts to cross a railroad track at a road crossing and has ample time to do so, but his engine chokes down and the automobile stops upon the railroad track, and it is not alleged in the declaration that the choking down of the engine was caused by the defective condition of the railroad crossing, the proximate cause of the accident is the stopping of the automobile, and the railroad is not guilty of negligence in not assuming that it would break down and stop on its track, provided that when the railroad employees saw that it had stopped on the track they at once did everything in their power to stop the train."
2. Persons operating a railroad train are not called upon to presume that the engine of an automobile, about to cross a railroad track sufficiently far ahead of the train to enable it to cross in safety, will choke down and cause the automobile to stop on its tracks.
3. The obligation of a railroad company to a person crossing its tracks in an automobile that has ample time to cross ahead of an approaching train does not begin until the instant its employees see that the automobile has stopped on its tracks, and if from that moment, they do all in their power to avoid a collision with the automobile, but are unable to do so, they are not chargeable with actionable negligence.

A Writ of Error to the Circuit Court for Santa Rosa County; A. G. Campbell, Judge.

Judgment reversed.

The B. L. & L. Co. v. Moneyway.—Opinion of Court.

McGeachy & Lewis, for Plaintiff in Error;

W. W. Clark and J. T. Wiggins, for Defendant in Error.

BROWNE, C. J.—The defendant in error obtained a judgment against the Bagdad Land & Lumber Company, a corporation, for damages to his automobile by a log train belonging to the plaintiff in error. The declaration contains three counts. The first count recites among other allegations, that “as the plaintiff’s automobile rolled upon the crossing of said railroad track the engine thereof, without the fault of plaintiff choked down, and stopped, and that thereupon the said defendant, through its agents and servants rapidly and negligently propelled the said locomotive and train of cars against the plaintiff’s automobile.”

The plaintiff below testified in part as follows: “I left home between six-thirty and seven o’clock in the morning. The railroad is about seventy-five yards from my house and it was kind of chilly, my car was cold and just before I reached the railroad my car choked down, I looked up the track and saw the train approaching, I jumped out, tried to crank my car, I could not do it, I tried to shove it off, and could not, and then I jumped in front of it on the track and tried to flag the train. I tried to flag the train down. Before I got to the railroad track I could not see up the track to see whether there was a train coming or not, on account of a row of trees beside Mr. Stewart’s fence. The engineer did not blow the whistle before it got down there. * * * I cranked my car,—or tried to crank it. I don’t have any starter on it. I attempted to shove it off of the track straight ahead. * * * That crossing right there is right smooth.

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I don't know what was wrong with my car that morning that made it choke down unless it was cold; and I had just had it overhauled and it was stiff. I didn't try to crank it after the train struck it, I didn't touch it. I run just around the side of my car, I didn't run up the track. I first discovered the train after I had stopped on the track and saw the train coming and I tried to crank off. After I tried to crank it and saw I could not and then I tried to shove it off and I could not. I could not do it, so then I tried to flag them. The engine was a hundred and fifty yards away then, I would say. They were running between ten and fifteen miles there when they hit the car."

S. F. McQuagge, a witness for the defendant, testified: "I work for the Bagdad Land & Lumber Company. I was working for that company in September, 1919. I began working for them then. I was working on the log train. I was on the log train coming in from Munson going towards Bagdad on the occasion of the striking of a car up in the northwest end of the town of Milton. I was on the engine. I was sitting upon the fireman's seat. I was head brakeman on the train. When the train was coming in the engineer blew the whistle at the whistling board right there at Rhoda's crossing,—Rhoda's gate. Mr. Colbert, the engineer, blew the whistle. As we came on, entering into the town I was sitting on the fireman's seat. I saw this car; I saw it just before it got up on the railroad track. I was sitting on the left hand side. I could see around the engine and see the car, still. When I saw the car I was about 350 feet from it I guess. Between three and four hundred feet. * * * After the car stopped on the track Mr. Moneyway got out of the car, made a motion to stoop down and crank the car, failed

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to start the car from the looks of it, walked back up the road and gave us that (waiving his hand) gave us the high hand, backed off and laughed when he saw the engine was going to hit the car. Backed off and laughed at us. The engineer put on his brakes and skidded his engine by the car, trying to stop. I did not examine the engine wheels after the accident. I do not know whether anything happened to them or not. I know what brakes the engineer put on, he put on the emergency brakes.”

F. B. Colbert, a witness for the defendant, testified: “I was on the engine the morning that Mr. Moneyway’s car was struck. I know the position in town where the car was struck. It was just before this F. & A. depot, a couple of hundred yards—two or three hundred yards. Perhaps it was more than that. I don’t know the names of the streets and crossings up there. I don’t know the names of the people who live along there. I was going south. His car was on the second street crossing. When I first saw this car he was just off of the railroad a little piece. I could see it from where I was. When I first saw it the best I can judge it was about ten or fifteen feet from the tracks—somewhere along like that. He attempted to cross the tracks with his automobile in front of the train. I don’t know what happened to the car,—it didn’t go across,—it stopped on the track. Mr. Moneyway got out of the car,—I guess it was Mr. Moneyway,—it was whoever was in the car. He got out of the car and got in front of it. I don’t know whether he tried to crank it or not,—did something, and I tried to stop when I saw the car was stopped on the track. I tried to stop the train. Then he went back off the track. I tried to stop the train just as soon as I saw the car stop on the track. I applied my brakes—the automatic air brakes. Yes,—we have emergency, automatic and independent air

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brakes, both on the engine. They are both on the same brake. You can put it on in an emergency. I put it on in emergency. After I saw that car on the track I did everything I could to stop the engine. I applied the brake in emergency. That was everything I could do. The brakes were put on the train too. The train wouldn't stop, it just kept coming on and shoved the engine on down. I don't know what size load I had. It was a heavy load. We had eighteen cars loaded with logs. I don't know what the length of the logs was. They had been cut,—the tops cut off. They were the full length of the trees on the cars. They don't cut these trees up, they just put the full length trees on, except they cut the tops off. There was a grade there where this engine struck this car. It was a down grade. When I applied my brakes the engine wheels skidded on the rail. I found it 'spotted' the wheels—had a spot on the wheels where they were dragged on the rails. It left a slick, smooth spot on them. This was caused by the wheels sliding on the rails. That happened when I tried to stop the engine, it dragged the car."

The uncontradicted testimony is that the railroad crossing at Hunt Street, where the accident occurred, is smooth; that the train was at least 150 yards away when the automobile's engine stalled; that after it stalled, Mr. Moneyway got out of his car, tried to crank it, and failing to start the engine, tried to push it off the track; failing in that he went on the track and tried to flag the train; the operators on the train saw the automobile when it stopped on the track, and at once tried to stop the train; they applied the automatic and emergency brakes to the engine, and put the brakes on the train also, and used every means possible to stop the train, which was com-

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posed of eighteen cars loaded with heavy logs; the train was making about ten miles an hour on a down grade.

What then was the proximate cause of the injury? When he attempted to cross the track, the train was 150 yards away, and there was ample time for him to have passed over in safety and been considerable distance on his journey, but for the choking down of his engine.

This case comes within the rule laid down by this court in *Louisville & N. R. Co. v. Harrison*, 78 Fla. 381, 83 South. Rep. 89, that: "When the driver of an automobile attempts to cross a railroad track at a road crossing and has ample time to do so, but his engine chokes down and the automobile stops upon the railroad track, and it is not alleged in the declaration that the choking down of the engine was caused by the defective condition of the railroad crossing, the proximate cause of the accident is the stopping of the automobile, and the railroad is not guilty of negligence in not assuming that it would break down and stop on its track, provided that when the railroad employes saw that it had stopped on the track they at once did everything in their power to stop the train."

The persons operating the train were not called upon to presume that the automobile's engine would choke down and cause it to stop on the track. "The obligation of the railroad began only at the instant that its employes knew that the auto had stopped on the railroad track. At that instant it became its duty to stop the train if possible. This the testimony discloses was done, but it was impossible to stop the train in time to prevent the collision." *Louisville & N. R. Co. v. Harrison*, 78 Fla. 381, 83 South. Rep. 89; *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 20 South. Rep. 558; *Atlantic Coast Line R. Co. v. Miller*, 53 Fla. 246, 44 South. Rep. 247.

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At the conclusion of the testimony a request for the court to charge the jury to find a verdict for the defendant was refused, and exception noted.

As the evidence shows that the proximate cause of the accident was the choking down of the engine of the automobile belonging to the plaintiff below, and fails to disclose any negligence on the part of the plaintiff in error, there could be no verdict for the plaintiff, and the defendant was entitled to a directed verdict in its behalf.

The judgment is therefore reversed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

FOREST INVESTMENT COMPANY, A CORPORATION, AND L. H. INGRAM, AS SHERIFF OF OSCEOLA COUNTY, FLORIDA, *Appellants*, v. S. B. AULTMAN, *Appellee*.

Opinion Filed December 4, 1920.

Petition for Rehearing Denied February 8, 1921.

A judgment against the maker and an endorser of a note obtained in a county where one of them resides, after service of process as provided by law, is not void and subject to collateral attack.

A Writ of Error to the Circuit Court for Osceola County; C. O. Andrews, Judge.

Judgment reversed.

Charles Cook Howell, for Appellants;

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Johnston & Garrett, for Appellee.

WHITFIELD, J.—A bill was filed in the Circuit Court for Osceola County by Aultman against Forest Investment Company, a corporation, and L. H. Ingram, Sheriff, in which it is in effect alleged that the defendant corporation obtained a judgment against S. B. Aultman and H. W. Williams in an action brought in the Civil Court of Record for Duval County upon promissory notes executed by Aultman as maker and endorsed by H. W. Williams; that Williams resides in Duval County, but Aultman resides in Osceola County. that the judgment has been recorded in Osceola County and an execution on the judgment issued by the Civil Court of Record for Duval County is in the hands of the Sheriff of Osceola County; that the judgment and execution are void because there was a misjoinder of parties defendant, because the defendant, Aultman, resides in Osceola County, and the cause of action did not accrue in Duval County and jurisdiction was not obtained of the person of Aultman. Relief against the lien of the judgment and execution was prayed. There was eventually a decree for the complainant and defendants appealed.

It is agreed that service of the summons issued in the assumpsit action was made upon Aultman in Osceola County and upon Williams in Duval County; that the notes were executed by Aultman as maker, payable to C. T. Ansley; that Ansley endorsed them to Peninsular Naval Stores Company, which company endorsed them to Williams, who endorsed the notes to Forest Investment Company, the plaintiff in the action on the notes.

In the final decree it is held:

1. H. W. Williams was improperly joined as a defend-

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ant with S. B. Aultman in the suit in the Civil Court of Record of Duval County, out of which this injunction suit arises, in that the said H. W. Williams was not an endorser at or before the execution and delivery of the promissory notes sued upon.

2. Jurisdiction in the said cause in the Civil Court of Record was erroneously sought to be procured by this improper joining of H. W. Williams as a defendant with S. B. Aultman, and that the court did not therefore have jurisdiction of the person or subject matter to said cause as against S. B. Aultman, and that therefore the judgment entered in said cause against S. B. Aultman was void and is not enforceable.

3. A void judgment against S. B. Aultman, when recorded in the County of Osceola, State of Florida, would constitute a cloud on property of said S. B. Aultman lying in said county.

While a void judgment may be subject to collateral attack, yet a judgment that may have been, but was not adjudged erroneous in appropriate appellate proceedings may not be assailed collaterally. See 15 R. C. L. 835 *et seq.*

Misjoinder of parties defendant in a transitory action, where the defendants were all duly served with appropriate process, may be an irregularity in procedure that would render the judgment erroneous and subject to reversal in appellate proceedings; but such judgment may not be void and subject to collateral attack.

Where under the statute a defendant in an action has the privilege of being sued in the county of his residence, and when duly served with appropriate process to give the court jurisdiction of his person, he does not by proper pro-

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ceeding claim his privilege, a judgment against him in the cause may not be void or even erroneous.

Where under the statute process for appearance in an action that is issued in one county may be served on a defendant in another county, such service if duly made gives the court issuing the process power to proceed with a cause of which it has jurisdiction, and the defendant so duly served with process may be bound by the judgment rendered.

Even if there was a misjoinder of defendants in this case under the rule of procedure applied in *Hough v. State Bank of New Smyrna*, 61 Fla. 290, 55 South. Rep. 462; *Webster v. Barnett*, 17 Fla. 272; and even if such rule is not modified by Chapter 6486, Acts of 1913, except as to those parties who endorsed or otherwise become secondarily liable on promissory notes "at or before the execution and delivery thereof," yet such misjoinder, if any, would be a mere irregularity for which the judgment may have been adjudged erroneous on proper appellate proceedings. The judgment would not be void where service of process was duly made on the defendants, one of whom resided within the county where the court had jurisdiction, there being a cause of action against both of them.

Under the statute suits against two or more defendants residing in different counties may be brought in any county in which any defendant resides. §1384, Gen. Stats., 1906.

As service of process was duly made upon Aultman in the county of his residence; *C. E. Ingalls & Bro. v. Merchants Broom Co.*, 68 Fla. 369, 67 South. Rep. 106, the judgment rendered against the maker and endorser was not void, therefore, it is not subject to collateral attack.

Reversed.

Page v. Parker et al.—Decision of Court.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

On Petition for Rehearing.

PER CURIAM.—A petition for rehearing is predicated upon the legal effect of Chapter 6486, Acts of 1913; but as a proper disposition of the cause does not involve a construction of the mentioned statute, all comment upon such statute in the opinion will be eliminated.

Rehearing denied.

All concur.

WALTER PAGE, *Plaintiff in Error*, v. MAGGIE PARKER, AS GUARDIAN OF THE PERSONS AND ESTATES OF JEFF GEOGHAGAN AND ALYNE GEOGHAGAN, MINORS, JOINED BY MACK PARKER, HER HUSBAND, AND JEFF GEOGHAGAN AND ALYNE GEOGHAGAN, MINORS, BY MACK PARKER, THEIR NEXT FRIEND, AND G. W. RHODES, *Defendants in Error*.

Decision Filed December 4, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Wakulla; E. C. Love, Judge.

W. J. Oven, for Plaintiff in Error;

W. C. Hodges and Fred H. Davis, for Defendants in Error.

Topouzi et al. v. Com. Cr. Co.—Decision of Court.

PER CURIAM.—This cause having heretofore been submitted to the court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

J. TOPOUZI AND E. MACRENARIS, CO-PARTNERS DOING BUSINESS AS GREEK-AMERICAN MACHINE SHOP, *Plaintiffs in Error*, v. COMMERCIAL CREDIT COMPANY, A CORPORATION, *Defendant in Error*.

Decision Filed December 4, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Pinellas; O. K. Reaves, Judge.

McKay & Withers, for Plaintiffs in Error;

N. B. K. Pettingill, M. B. Macfarlane and R. E. L. Chancey, for Defendant in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of coun-

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sel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

N. N. ZANETIS, *Plaintiff in Error*, v. COMMERCIAL CREDIT COMPANY, A CORPORATION, *Defendant in Error*.

Decision Filed December 4, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Pinellas; O. K. Reaves, Judge.

McKay & Withers, for Plaintiff in Error;

N. B. K. Pettingill, M. B. Macfarlane and R. E. L. Chancey, for Defendant in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court

U. D. S. Co. v. C. C. Co.—Decision of Court.

that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

UNITED DIVERS SUPPLY COMPANY, A CORPORATION, *Appellant*, v. COMMERCIAL CREDIT COMPANY, A CORPORATION, ET AL, *Appellees*.

Decision Filed December 4, 1920.

An Appeal from a Decree of the Circuit Court within and for the County of Pinellas; O. K. Reaves, Judge.

McKay & Withers, for Appellant;

N. B. K. Pettingill, M. B. Macfarlane and R. E. L. Chancey, for Appellees.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Owens v. Bryant et al.—Decision of Court.

W. H. OWENS, *Plaintiff in Error*, v. MARGARET BRYANT,
BY HER NEXT FRIEND, W. S. BRYANT, AND W.
BRYANT IN HIS OWN BEHALF, *Defendants*
in Error.

Decision Filed December 6, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of DeSoto; John S. Edwards, Judge.

Leitner & Leitner, for Plaintiff in Error;

Timberlake & Robbins, for Defendants in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

McAllister v. Nordello—Decision of Court.

MRS. E. C. McALLISTER, *Appellant*, v. JOSEPH NORDELLO,
Appellee.

Decision Filed December 6, 1920.

AN Appeal from a Decree of the Circuit Court within
and for the County of Dade; H. Pierre Branning, Judge.

Atkinson & Burdine, for Appellant;

A. J. Rose, for Appellee.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the decree aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and adjudged by the Court that the said decree of the Circuit Court be, and the same is hereby, affirmed.

All concur.

S. A. L. Ry. v. R. P. S. Co.—Syllabus.

SEABOARD AIR LINE RAILWAY, A CORPORATION, *Plaintiff in Error*, v. ROYAL PALM SOAP COMPANY, A CORPORATION, *Defendant in Error*.

Opinion Filed December 7, 1920.

Petition for Rehearing Denied January 27, 1921.

1. Charges given to the jury should conform to the evidence adduced in the case and the evidence should not only preponderate in favor of the verdict, but the evidence should produce in the minds of the jury a reasonable belief of the facts essential to the verdict.
2. Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the court, and having no relation thereto.
3. Charges should state the law of the case correctly, and should be predicated upon the facts in proof, and when predicated upon a statement of facts contrary to the uncontradicted and undisputed proofs in the case they are erroneous.
4. Charges of the court to juries must be confined to the issues and must be predicated upon facts in proof.
5. Abstract charges that do not conform to the evidence adduced, may be harmful error when the evidence does not certainly warrant a reasonable belief of the facts essential to sustain the verdict named.

A writ of error to the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Judgment reversed.

Knight, Thompson & Turner, for Plaintiff in Error;

S. A. L. Ry. v. R. P. S. Co.—Opinion of Court.

Hilton S. Hampton and A. B. McMullen, for Defendant in Error.

PER CURIAM.—This writ of error was taken to a judgment awarding damages for property destroyed by fire. There was no testimony that fire was seen to escape from the railroad company's locomotive, but there was testimony that fire was seen on or near the track within perhaps fifteen or twenty feet of the property soon after the engine passed over the place and that within perhaps a half hour after a small fire was first seen on or near the track, the property in question was seen to be on fire. There was also testimony that boys smoking cigarettes were seen at or near the place where the fire was first seen at the time the engine passed. While there was testimony that the engine had been known to emit sparks of considerable size, it was shown that the engine had since then been overhauled and the defects remedied by appropriate additions to the smoke stack and fire box. A preponderance of the testimony tended to indicate that the fire box was in a reasonably good condition, though there was testimony of a witness who "just stood off on the side" of the engine, that he saw two days after the fire that the fire box of the engine "wasn't either put together close when it was built or it has rusted out or burned out in the corners." There was no testimony that the smoke stack was not in proper condition; and there was no showing that any fire escaped or could have escaped from the smoke stack. The train crew testified to the careful operation of the engine and that no fire was seen to escape from the engine and no fire was seen by them after the engine passed over the particular place in switching.

It has been repeatedly held that charges given to the jury should conform to the evidence adduced in the case

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and that the evidence should not only preponderate in favor of the verdict, but that the evidence should produce in the minds of the jury a reasonable belief of the facts essential to the verdict. *Escambia County Electric Light & Power Co. v. Southerland*, 61 Fla. 167, 55 South. Rep. 83; *Floralá Saw Mill Co. v. Smith*, 55 Fla. 447, 46 South. Rep. 332.

Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the court, and having no relation thereto. *Whitner v. Hamlin*, 12 Fla. 18.

Charges should state the law of the case correctly, and should be predicated upon the facts in proof, and when predicated upon a statement of facts contrary to the uncontradicted and undisputed proofs in the case they are erroneous. *Mullikin v. Harrison*, 53 Fla. 255, 44 South. Rep. 426.

Charges of the court to juries must be confined to the issues and must be predicated upon facts in proof. *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 43 South. Rep. 687; *Farnsworth v. T. El. Co.*, 62 Fla. 166.

At the plaintiff's request the court gave instructions involving statements of the duty of a railroad company to exercise utmost care in running a train through a town or village where property is exposed to fire "that may come in large quantities from the locomotive," and also an instruction that an issue to be determined by the jury was whether the defendant failed to discharge its duty as to the spark arrester on the engine.

Even if it is shown that this alleged fire loss occurred in a town or village, there is no evidence that fire in large

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quantities came from or could have come from the locomotive, and there was no contradiction of the evidence that the smoke stack was in proper condition and that the engine was properly operated. In view of the uncertainties that pertain in the circumstances from which the jury doubtless drew an inference that the fire was caused by the defendant's engine, there being much evidence of the exercise of due care and no direct evidence to the contrary, it cannot be fairly said that the abstract charges given at plaintiff's request that do not conform to the evidence in the case were not harmful to the defendant, or that without such charges the jury would certainly have deduced a reasonable belief of the facts essential to sustain the verdict rendered. *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. Rep. 66.

In many important aspects the facts of this case are quite different from those in *J. T. & K. W. Ry. Co. v. P. L. T. & M. Co.*, 27 Fla. 1, 10 South. Rep. 688.

Judgment reversed for a new trial.

BROWNE, C. J., AND TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

J. J. McCANN, JOHN H. TREADWELL AND THE ACLINE FARMS, A CORPORATION, *Appellants*, v. NELLIE G. WARE, *Appellee*.

Opinion Filed December 8, 1920.

1. Specific performance of a contract for the sale of lands will not be granted in a case where the vendor is the actor de-

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manding the remedy without compensation for an outstanding right in the lands to the extent of an undivided half interest in third persons.

2. A vendor in a contract for the sale of lands who has no title to the lands at the time of the contract made, and such land is afterwards acquired partly by the vendee to such contract from another source and under circumstances which would not preclude him from the favorable consideration of a court of equity, and partly by a third person, is not entitled to a decree in equity requiring the vendee to pay the full purchase price for the half interest held by him upon the theory that such interest is held in trust for the complainant vendor.

An Appeal from the Circuit Court for DeSoto County;
John S. Edwards, Judge.

Decree affirmed in part; reversed in part.

Brown & Jones, for Appellants;

Leitner & Leitner, for Appellee.

ELLIS, J.—The appellee, Nellie G. Ware, exhibited her bill in chancery in the Circuit Court for DeSoto County, against J. J. McCann, John H. Treadwell and the Acline Farms, a corporation, praying that the title to certain lands in that county claimed by Treadwell and the Acline Farms and acquired from the estate of Jacob Edwards be held in trust for the use of complainant and that the defendant McCann be decreed to specifically perform his contract with complainant for the purchase of the lands. The bill alleges that in March, 1911, the complainant owned the lands described in the bill and that she and McCann entered into a written agreement whereby she

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agreed to sell and McCann agreed to purchase the land for a certain consideration named in the agreement. That there were some defects in the complainant's title consisting of an "apparent cloud" upon her title in an "outstanding title in the estate of Jacob Edwards" and that "these defects" it was necessary to remove before McCann would accept complainant's title; that it was not agreed who would undertake to remove the defects in complainant's title, but that both of them, complainant and McCann "proceeded at once to perfect the title" by "endeavoring to obtain deeds from the said estate of Jacob Edwards;" that McCann employed J. H. Treadwell to obtain quit-claim deeds from the "estate" of Jacob Edwards; that Treadwell took the title from the heirs of Jacob Edwards in the name of himself and Albert Dewey, but that it was known to all the parties that "this said deed from the estate of the said Jacob Edwards" was obtained to perfect the title of complainant; that Dewey, an officer of the Acline Farms, conveyed the land to that corporation; that McCann was secretary and treasurer of the corporation, and that all the parties to the transaction had full knowledge of the complainant's title, and that the deeds obtained from the Edwards heirs were for her benefit; that when the title of complainant was perfected in this manner she offered to comply with her contract with McCann, who declined to carry out the contract on his part. The bill contains a paragraph in which it is alleged that as Treadwell was attorney for McCann, and as McCann and Dewey were stockholders and officers of the Acline Farms, that Treadwell and the Acline Farms held the Edwards title to the lands in trust for the complainant.

The defendants answered separately. Treadwell in his answer denied the complainant's ownership of the

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lands and averred that the complainant's claim of ownership arose in the following manner: In 1895 the Florida Commercial Company conveyed to J. S. Sandlin, who in October of that year conveyed to W. R. Ware; that in 1911 Ware was declared a bankrupt. J. H. Porter was appointed trustee, who reported to the court that the land, which was wild land, belonged to Nellie G. Ware; that she had purchased it from the true owner; that the bankrupt's title was invalid, but constituted a cloud on the title of Nellie G. Ware; that by order of the referee the trustee sold the land to Nellie G. Ware for fifty dollars. It is averred that at the time Porter as trustee filed his report or petition to the court Nellie G. Ware had no title to the land, either legal or equitable, nor did the estate of the bankrupt W. R. Ware have any interest or title in or to the land; that the Florida Commercial Company, Sandlin's grantor, never had any title; that it belonged to the heirs of Edwards and the Florida Southern Railroad Company, from whom the defendant and Acline Farms bought it without notice of any interest claimed by the complainant. The answer denied that he had any knowledge of the contract between McCann and complainant, or any notice of negotiations between them, until after he had acquired his interest. The answer then continues with a full statement of the defendants' connection with the transaction, which amounted to a complete denial of all allegations in the bill connecting him with the transaction as McCann's attorney, and prays that the deed held by complainant be declared to be a cloud upon his title.

The Acline Farms answered denying the complainant's ownership of the land, made the same averments as to title as were contained in Treadwell's answer, averred that it had no notice of any title in complainant, and

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denied McCann's authority to make any such contract with complainant in the defendant's behalf. The answer contained a demurrer to the bill for want of equity, and that it is repugnant to the written instrument attached to it and upon which the suit rests.

The court overruled the demurrer.

J. J. McCann answered the bill, in which he denied the complainant's ownership of the land, and averred that the title was in the heirs of Edwards and in the Florida Southern Railroad Company, from whom Treadwell and the Acline Farms acquired it without notice of complainant's claim, denies the contract for the purchase of the land from Nellie G. Ware, denies knowledge of any effort to obtain the Edwards' title, or that the parties understood that it would be obtained for the benefit of complainant. Denied that he knew complainant, or had ever met or had any acquaintance with her, denied that he employed Treadwell to obtain the Edwards' title, and averred Treadwell's connection with the transaction as the latter had averred it to be in his answer. The answer denied that the Acline Farms took title from Dewey with any knowledge of complainant's claim, or that the complainant ever offered to him a sufficient deed to convey the premises to him in accordance with the terms of the pretended contract. There was a demurrer incorporated in this answer upon the same grounds as that in the answer of the Acline Farms. This demurrer was also overruled.

Testimony was taken before a master and report made in August, 1917. Final decree was entered September 23, 1918. The Chancellor finding the equities to be with the complainant; that Treadwell bought the land without notice of the contract between complainant and McCann;

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that the Acline Farms took a half interest in the land with full notice of such contract which should be specifically performed; that the complainant was the owner in fee simple of an undivided half interest in the land and had tendered a good and sufficient deed of conveyance thereof to the defendant McCann and decreed that he should accept the deed and pay the full contract price for the complainant's interest which she was to receive for the whole interest, together with interest on such sum from March 31, 1911; that in default of such payment execution should issue in favor of the complainant against McCann for the amount of principal and interest and costs. The bill was dismissed as to Treadwell without prejudice; that the Acline Farms held an undivided half interest in the land for the use of the complainant. From this decree the defendants appealed.

The alleged contract which was the basis of this suit purports to have been entered into between Nellie G. Ware, a widow, of the County of Fulton, in the State of Georgia, and J. J. McCann, of DeSoto County, Florida. It is recited that Mrs. Ware had proposed to sell to McCann two tracts of land in DeSoto County, aggregating 1202 acres, more or less, for the sum of \$7,500.00. The land was described as follows: All of Section 5, T. 42 S. R. 23 E., containing 642 acres, more or less, and the east half and east half of west half and northwest quarter of northwest quarter and southwest quarter of southwest quarter of Section 33, T. 41 S., R. 23 E., containing 560 acres more or less. That McCann had raised a question as to the title to the land in Section 33. It was therefore agreed that Mrs. Ware would execute a deed to McCann conveying the land in Section 5 for the sum of \$4,006.00, which deed was to contain a "condition" that Mrs. Ware would sell to McCann "Section thirty-

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three (33), containing five hundred and sixty (560) acres, for the sum of three thousand and four hundred and ninety-four (\$3,494.00) dollars, and the said McCann accepts said deed contemporaneously with the execution of this contract with the agreement fixed that he shall take said land and pay said sum to said Mrs. Ware upon the removal of the present defects in the title to said Section thirty-three (33)." This contract seems to have been witnessed by J. R. Sandlin and two others, and the execution thereof acknowledged by McCann before Sandlin as a notary public.

It was for the enforcement of this contract in so far only as it applies to the lands in section thirty-three that the suit was begun.

We think the decree was erroneous for several reasons. It is a case in which the vendor is the actor demanding specific performance of the contract without compensation, although there is an outstanding right to the extent of an undivided half interest in the land in a third person which the court found to be the fact, and which the evidence fully sustains.

Now the contract which was attached to the bill as an exhibit and made a part of the bill of complaint, contemplates the conveyance by the complainant of a good title to the entire interest. At the time the contract was executed the vendor was not in a position to comply with it because of the acknowledged "defects," so-called, in her title. The vendee McCann did not agree to accept such title as the vendor had, but agreed to buy the land at the price agreed "upon the removal of the present defects" in the vendor's title. It appears from the evidence in the case that the vendor had no title to the lands, that it was held entirely by third persons. That

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it was acquired by persons with whom the defendant was associated in business, but under such circumstances that one of them, the defendant Treadwell, acquired the title to an undivided half interest without any knowledge of the contract alleged to have existed between the complainant and McCann. In this statement we do not mean to suggest that knowledge by Treadwell of the existence of the contract would have destroyed his good faith in the transaction, because he acquired his interest from persons who independently of Mrs. Ware and McCann held the title to the property and had a right to convey it. This is also true as to the defendant Acline Farms, which acquired the remaining undivided half interest. This was acquired through the agency of Mr. Sandlin and Mr. Dewey, the latter being the president of the Acline Farms, of which McCann was a stockholder, and the former who was also a stockholder and the person who acted for McCann in the transaction with Mrs. Ware. But these facts did not place McCann in a situation which would deny him the favorable consideration of a court of equity to which application is made for the specific performance of the contract. Yet the court by its decree ordered the enforcement of the contract against the vendee without any regard to the vendors entire, not partial, failure of title compelling McCann the vendee to take an undivided half interest held by the corporation, erroneously decreed to be held in trust for the complainant and to pay the full price as agreed. Under ordinary circumstances where the vender has something to give, but less than what he contracted to give, such course is extremely unjust and inequitable. See *Pomeroy's Contracts, Specific Performance* (2nd ed.), Sec: 434.

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In the case at bar the purchaser McCann was not only unwilling to take a partial interest, but denied that the vendor has any interest or title whatsoever to convey. The chancellor found that the complainant had only an undivided half interest and that was held in trust by the Acline Farms for her benefit. This finding we think was erroneous, being wholly unsupported by the evidence, yet the decree requires McCann to accept that interest, pay the full price agreed to be paid for the entire interest, and to pay interest on that amount at 8% per annum from the date of the contract, when confessedly by all parties the vendor could not have conveyed a good title to any interest whatsoever in the land.

The decree in so far as it orders a specific performance of the contract is erroneous upon its face, it rests upon no equitable ground or consideration, it is unsupported by any evidence. In so far as it decrees a dismissal of the bill against Treadwell it is correct and is hereby affirmed; in all other respects it is reversed with directions to dismiss the bill.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Hunter v. Owens et al.—Syllabus.

JAMES J. HUNTER, CITIZEN AND TAXPAYER OF PALM BEACH COUNTY, FLORIDA, *Appellant*, v. JAMES M. OWENS, AS TAX ASSESSOR OF PALM BEACH COUNTY, FLORIDA; T. J. CAMPBELL, AS TAX COLLECTOR OF PALM BEACH COUNTY, FLORIDA, AND G. S. CHILD, C. A. BARNETT, E. W. BUNKER, W. K. OSBORNE, C. C. MAST AND A. E. PARKER, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF SOUTH LAKE WORTH INLET-DISTRICT, *Appellees*.

Opinion Filed December 8, 1920.

1. In the exercise of its inherent sovereign powers, the State may impose taxes to be used for a governmental purpose, and the only limitations imposed are those contained in the Federal and State Constitutions, designed to protect personal and property rights against arbitrary and oppressive exertions of governmental power.
2. The extent of a taxing unit for a public purpose may be confined to a designated district or subdivision that may be or whose inhabitants may be directly and peculiarly benefited by the application of the tax money to the purpose contemplated.
3. The object of a tax may be a matter designed to conserve the public health, comfort and convenience of the inhabitants and others in the particular community, and the mere fact that persons who do not share the tax burden may also be benefited by the undertaking, does not affect the governmental power. It is not practicable or contemplated that public benefits shall be shared only by those who bear the burden thereof.
4. The validity of a statute exerting the police power does not depend upon the absolute assurance that the purpose designed can in fact be or will most probably be fully accomplished as contemplated, or upon the certainty that it will best conserve the purpose intended or that the purpose designed is necessary or expedient for the general welfare.

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5. Matters of policy, expediency and wisdom are determined by the enactment of statutes; and their invalidity is dependent only upon actual conflicts with organic law.
6. Where a statute levying a tax, in terms or in effect, states that it is for the purpose of conserving the public health, comfort and convenience, it may be sustained on that ground, if otherwise valid, unless it clearly appears from the act itself or from a consideration of the circumstances and conditions within which it is to operate, that the law in reality has no fair relation to the public purpose stated or manifestly intended, or that it in effect violates organic law while superficially appearing to serve a lawful public purpose.
7. Where a statute is not clearly violative of organic law in its expressed terms and legal effect, or its manifest purpose, it will not be held inoperative as in conflict with organic law merely because it may not be constitutionally applied under given conditions or merely because it is doubtful whether it will be as efficacious as was apparently contemplated, where circumstances are conceivable within which the law may validly operate or where its efficacy as intended may be realized in the course of human events.
8. In testing the validity of a statute with reference to the facts and circumstances upon which it is to operate, the validity of the statutes does not depend upon the preponderance of evidentiary considerations; but the statute stands unless it conclusively appears that there are or can be no conceivable circumstances upon which it can validly operate, or that under no circumstances can it operate or be effective to accomplish the intended purpose, without violating organic rights.
9. The propriety of action taken under a statute is subject to judicial review.
10. While under the Constitution "no tax shall be levied for the benefit of any chartered company of this State," (Sec. 7, Art. IX), yet if a public improvement that is afforded by tax levies, does merely incidentally benefit private corporations

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along with other persons, the Constitution is not violated in levying the tax for the public purpose, for the law contemplates that corporations shall participate in the burdens and benefits of taxations within appropriate limitations.

11. Chapter 7080, Acts of 1915, is not on its face an arbitrary exertion of governmental power oppressive of private rights; and it does not appear that its due operation will violate organic law. Illegality or abuse of authority in applying the statute may be remedied in due course of law.
12. The wisdom, necessity, expediency, feasibility and probable success of a governmental statutory project are not subject to judicial review, where the statute is not clearly a violation or evasion of organic law and has substantial basis in a lawful public purpose within the scope of the police power.

An Appeal from the Circuit Court for Palm Beach County; E. B. Donnell, Judge.

Decree affirmed.

C. D. Abbott, for Appellant;

E. J. L'Engle and *P. L. Gaskins*, for Appellees.

STATEMENT.

Chapter 7080, Acts of 1915, creates and incorporates "a Special Taxing District in Palm Beach County, Florida, to be known as 'South Lake Worth Inlet District' embracing" stated areas, and provides that the governing body of said South Lake Worth Inlet District shall consist of six persons, qualified electors of said District, who shall be known as and designated by "The Board of Commissioners of South Lake Worth Inlet District," and who shall be elected as provided for in this Act.

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It is also provided, Sec. 5: "That said Board is hereby authorized and empowered to construct and thereafter to maintain an inlet or waterway connecting the waters of Lake Worth with the Atlantic Ocean, at a convenient and proper place within said district, and to do all acts and things proper, necessary or convenient for that purpose and in that connection. That the opening, cutting and maintenance of said inlet or waterway at some point within the District between Lake Worth and the Atlantic Ocean is hereby found and declared to be necessary for the maintenance of the health of the inhabitants of the territory embraced in said district, and for the convenience, comfort and welfare of said district and the inhabitants thereof. That the location of said inlet or waterway shall be determined by said Board upon the approval and recommendation of the Chief Engineer of said Board. In determining the location for said inlet or waterway, due consideration shall be given by said Board to the following:

"(a) The kind and nature of material which will be encountered in excavating for the foundation and in removing the material preparatory to the construction of said inlet, and the cost of the work to be done in connection therewith.

"(b) The natural depth of water on both the Atlantic Ocean and Lake Worth ends of said proposed inlet or waterway, as affecting the future maintenance of the channel and the efficiency and operation of said waterway.

"(c) The convenience which will result to the inhabitants of said district in using said inlet or waterway.

"(d) All other features which from an engineering or economic standpoint should be considered as having weight in determining the exact location of said inlet or waterway.

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"If reasonable doubt exists in the mind of said Chief Engineer, or of all or any members of said Board, with regard to the location of said inlet or waterway, said Chief Engineer, with the approval and under the directions of said Board, shall employ a consulting engineer, who, with said Chief Engineer, shall make and file with said Board a joint report recommending a location of said inlet or waterway, and the findings in such report, if approved by said Board, shall fix the location of said inlet or waterway. Said Board shall have the sole and final power to determine the location of said canal or waterway.

"Before any construction work upon said inlet shall be undertaken, it shall be the duty of said Chief Engineer to prepare and submit to said Board a plan showing in detail a method to be employed in the construction of said inlet or waterway and providing for full and complete protection to adjacent property from any injury or damage which might follow as a result of the construction of said inlet or waterway. Said plan shall thereafter be submitted to and approved by a competent consulting engineer thoroughly versed in works of this nature, and when so adopted and approved shall be adhered to in the construction work upon such inlet or waterway, except in case it shall appear desirable as the work advances to modify said plan in order to further insure permanency in the location of said inlet or waterway and protection to the adjacent property, then a modification of said plan to accomplish said purpose may be permitted and regularly incorporated in said plan after having been approved by said consulting engineer and adopted by said Board.

"Provided, further, that for any damage or injury occasioned or occurring to private property by washing, overflowing of lands from other cause, resulting from con-

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structing of such inlet or the opening thereof, the owner of such property shall have the right to maintain and prosecute any appropriate action at law or in equity, against such Inlet District, for such damage as may have resulted therefrom.

Sec. 8. "That said Board is hereby authorized and empowered to levy upon all of the real and personal taxable property in said district a special tax not exceeding ten (10) mills on the dollar for the year 1916, and not exceeding ten (10) mills on the dollar for each and every year thereafter, to be used solely for the purposes authorized and prescribed by this Act. Said levy shall be made each year, not later than the first day of June of each year by resolution of said Board or a majority thereof, duly entered at large upon its minutes. Certified copies of such resolutions executed in the name of said Board by its Chairman and Secretary and under its corporate seal shall be made and delivered to the Board of County Commissioners of Palm Beach County and to the Comptroller of the State of Florida not later than the 15th day of June of each and every year hereafter. It shall be the duty of the County Commissioners of Palm Beach County to order the Assessor of said County to assess and the Collector of said County to collect the amount of taxes so assessed by said Board of County Commissioners of South Lake Worth Inlet District upon all the taxable real and personal property in said district at the rate of taxation adopted by said Board for said year, and included in said resolution, and said levy shall be included in the warrant of the Tax Assessor and attached to the assessment roll of taxes for said County each year. The Tax Assessor shall assess and the Tax Collector shall collect such tax so levied by said Board in the same manner as other taxes are collected and said Tax Collector shall collect and pay

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said taxes, within the time and in the manner prescribed by law, to the Treasurer of said Board. It shall be the duty of said Comptroller to assess and levy on all the railroad lines and railroad property and telegraph lines and telegraph property situate in said district the amount of each such levy as in case of other State and County taxes, and to collect the said taxes thereon in the same manner as he is required by law to assess and collect taxes for State and County purposes, and to remit the same to the Treasurer of said Board. All such taxes shall be held by said Treasurer for the credit of said Board and paid out by him as provided herein."

The statute contains numerous other provisions including Sec. 24: "Any clause or section of this Act, which for any reason may be declared invalid, may be eliminated from this Act, and the remaining portion or portions thereof shall be and remain in force and valid as if such invalid clause or section had not been incorporated therein."

Chapter 7081 similarly incorporates "Lake Worth Inlet District" with like powers. The two corporate bodies are designed to effectuate prescribed plans for improving the health, comfort and convenience and welfare of the people of the towns and villages within the districts situated on or near the shores of Lake Worth, which is a long narrow body of water extending nearly thirty miles along the South Atlantic Coast of the State with a strip of land between it and the ocean, and a connecting channel towards the north end of the Lake. Into this lake the sewers of towns empty and a large volume of water is conducted from towards the interior of the peninsular portion of the State where extensive drainage operations are prosecuted.

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The improvements contemplated by Chapter 7080 include an inlet between the Atlantic Ocean and the southern portion of Lake Worth to permit a flow of water between the lake and the ocean, the resulting purpose being an improvement in the character of the water in the lake to conserve the public health and the economic uses of the water for propagating shell fish and for domestic use, and also to provide a passageway between the lake and the ocean for boats used by the residents and others along the southern portions of the lake where the "South Lake Worth Inlet District" is formed. The operations in the "Lake Worth Inlet District" under Chapter 7081 are towards the northern portion of the lake.

In an amended bill of complaint brought by James J. Hunter as a citizen and taxpayer on real estate in the district against the Board of Commissioners of South Lake Worth Inlet District, and the Tax Assessor and Tax Collector of Palm Beach County, it is in substance alleged that said Board "should not be permitted to exercise the powers and privileges granted to them and each of them by said Chapter 7080, Laws of Florida, and that said Board of Commissioners particularly should not be permitted to exercise the powers granted and conferred on them by said Chapter 7080, Laws of Florida, for the following reasons, to-wit:

"(a) That said Act, Chapter 7080, Laws of Florida, Acts 1915, authorizes the construction of an inlet connecting the waters of Lake Worth with the Atlantic Ocean by and under the direction, supervision and management of the said Board of Commissioners, aforesaid, and their successors, and provides that the cost of constructing and maintaining such inlet shall be borne entirely by the special district mentioned in said act and

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designated as the South Lake Worth Inlet District, and not by the people of Palm Beach County or by the people of the State of Florida at large.

“(b) That said Board of Commissioners by the terms of said act are authorized and empowered to borrow money and to issue negotiable promissory notes, bonds, or other evidences of indebtedness therefor to enable them to carry out the terms and provisions of said act, and no limitation is placed by the terms of said act upon the amount of money which said Board of Commissioners may borrow on such promissory notes, bonds or other evidences of indebtedness except as to the amount of bonds as hereinafter set forth; that the opening, cutting and maintenance of said inlet or water road at some point within said district is not necessary for the maintenance of the health of the inhabitants of said territory embraced in said district and for the comfort, convenience and welfare of said district and the inhabitants thereof.

“(c) That said Board is authorized by said act to clean out, straighten, widen, change the course of or deepen any water course, or natural stream or body of water in said district that may be deemed necessary by said Board to facilitate the opening and maintenance of the canal, inlet or water way between the said Lake Worth and the Atlantic Ocean, and to construct and maintain canals, ditches, levees, etc., deemed by said board to be necessary to preserve and maintain the works of said district, thereby placing the power in the hands of said board to tax the people of the said taxing district aforesaid for the maintenance of canals and ditches heretofore constructed by private corporations for drainage or for other purposes, and thereby to place a lien on all property in said district for the purpose of maintaining ditches, canals and

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waterways heretofore constructed for drainage or other purposes, by private corporations or others, which in the opinion of said board may be necessary to protect said inlet sought to be constructed to connect the waters of said Lake Worth with the waters of the Atlantic Ocean.

“(d) That by the terms of said act said board is authorized to issue bonds to the amount of one hundred thousand dollars, provided the same shall be approved by an affirmative vote of a majority of the qualified electors residing in said special taxing district, the proceeds arising from the sale of said bonds to be used by said board in constructing the canal or inlet connecting the waters of Lake Worth with the waters of the Atlantic Ocean, or any other work carried on by said board, without fixing a minimum price at which said bonds may be sold, thereby giving to said board the power and authority to negotiate said bonds at a ruinous discount and causing in effect, the people of said district to pay interest on said bonds at a usurious rate.

“(e) That while by the terms of said act, the inlet or canal connecting the waters of Lake Worth with the waters of the Atlantic Ocean, as contemplated thereby, purports to be for the benefit of the people in said special taxing district and for the purpose of maintaining the health, etc., of said district, the provisions thereof were intended to be and is in effect really for the benefit of the private corporation known as The Palm Beach Farms Company in this, that the said Palm Beach Farms Company has heretofore constructed a canal system for the drainage of lands owned by said company and lying west of Lake Worth and partly included in said special taxing district, and the waters drained from said area in which said private system of canals has been constructed by

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said Palm Beach Farms Company has in great part, emptied into the waters of Lake Worth through the Boynton and Palm Beach Canals, and such drainage has tended to deepen the water at the south end of Lake Worth and thereby made lands of the riparian owners at said south end of Lake Worth liable to overflow during storm seasons and thereby make said Palm Beach Farms Company liable to such riparian owners for the damage or injury caused by such overflow, and that said act is intended to cause such condition to be abated at the expense of the people of said special taxing district and not at the expense of the said Palm Beach Farms Company the private corporation which in fact created such condition and should therefore be required to furnish the necessary outlet to maintain the waters of Lake Worth at their normal level the said act therefore is class legislation.

“(f) That the Constitution of the State of Florida does not empower the legislature to enact a statute authorizing a special tax levy for the purpose of constructing canals or inlets, but on the contrary such power is limited to the levy of taxes for State, County and Municipal purposes only, and that by the operation of statute your orator will be deprived of his property without due process of law in violation of the Constitution, of the enacted statute and by the State of Florida.

“(g) That there is an unauthorized delegation of power to said board of commissioners, in the relation to the levy of taxes upon the real and personal property embraced within said special taxing district.

“(h) That while the amount of bonds issuable by said board is limited to one hundred thousand dollars, and millage levied upon the real and personal property embraced within said special taxing district is limited to ten

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mills, in each year, still the authority of said board by the terms of said act, to borrow money upon its promissory notes is practically unlimited and thus said board would have the authority to create a floating debt of such amount as would require a levy of ten mills taxes for an unlimited period of time, thereby creating a perpetual indebtedness upon the taxpayers of said special taxing district.

“(i) That the purposes for which said board was created, to-wit, the construction of a canal or inlet from the said Lake Worth to the Atlantic Ocean is impossible of completion, for the reason that there is already an inlet connecting the waters of Lake Worth, which is a body of water about thirty miles long and one-half mile wide with an average depth of about ten feet, with the waters of the Atlantic Ocean, which said inlet is only about twenty miles north of the site of the proposed site of the canal or inlet contemplated by said board of commissioners, and the effect of the construction of another inlet from the waters of Lake Worth, to the waters of the Atlantic Ocean would be to close either the present inlet or the inlet contemplated by said board of commissioners, and the government engineer in charge of the waterways of the State of Florida, Major Ladue, your orator is informed and believes and therefore alleges has stated that the War Department of the Government of the United States will not permit the construction of the canal or inlet contemplated by said board of commissioners.”

It is further alleged that the Board of Commissioners have been by the courts restrained from exercising the powers conferred by the statute; that the terms of the Commissioners have expired; that all the money collected

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by the Tax Collector on account of the special tax under the statute is now held by him; that unless restrained the Tax Assessor and Tax Collector will assess and collect or sell for non-payment of further taxes under the statute. The prayer is that the taxes so collected be decreed to be a trust fund for those who paid it in, and that the defendants all be enjoined from further action under the statute.

Demurrers to the bill of complaint were overruled.

An answer put in issue many of the material allegations of fact contained in the bill of complaint, and includes the following:

“The land on the shores or banks of Lake Worth is to a large extent occupied by towns and suburban residences and farms, and a considerable population, aggregating approximately persons, live on or near the shores of said lake, including the cities and towns of Palm Beach, West Palm Beach, Lake Worth and Boynton. The sewerage from these cities, towns and residences is and has been for many years to a large extent deposited and discharged into said Lake Worth, and as a result thereof the waters of said lake have been rendered impure, and, in the opinion of many persons, unwholesome and unsanitary. By reason of the fact that the principal tidal outlet of said Lake Worth is through the inlet at the north end thereof, and the fact that said lake is from twenty-three to twenty-four miles long and only about one and a half miles wide on the average, there is and has been no constant flow or current of water from all parts of said lake to or from the Atlantic Ocean, resulting in comparative stagnancy in said lake, which does not sufficiently relieve said lake of the impurities discharged therein by the sewage systems above mentioned.”

A replication was filed and voluminous testimony taken.

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In the final decree dismissing the bill of complaint the Chancellor specifically found on supporting evidence that the charge made in the bill that the statute was enacted for the benefit of a named private corporation, and therefore violative of the Constitution, was "not sustained by the evidence." The decree also found "that the cutting of the inlet is not necessary for the health of the inhabitants of the district," but that there was evidence that the convenience, comfort and welfare of the district and the inhabitants thereof would be considerably increased by the cutting of the inlet.

An appeal was taken and several matters of law and of fact are argued as showing the statute to be violative of the State and Federal Constitutions.

The statutes of the State relative to general taxation provide:

"The County Assessors of Taxes shall complete the assessment rolls of their respective counties on or before the first Monday in July in every year, on which day such Assessors shall meet with the Board of County Commissioners at the Clerk's office of their respective counties for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the County Assessor of Taxes, of perfecting, reviewing and equalizing the assessment, and may continue in session for that purpose from day to day for one week, or as long as shall be necessary. Due notice of such meeting shall be given by publication in a newspaper published in such county, or by posting a notice at the courthouse door, if there be no newspaper published in the county, at least fifteen days before the Board will be in session for the purpose of hearing complaints and receiving testimony as to the value of any property as fixed and assessed by the

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County Assessor of Taxes; provided, that the County Commissioners of any county may, if they deem it necessary, extend the time for the completion of such assessment roll and for the purpose of revising and equalizing the assessment, a similar extension, not exceeding thirty days, giving due notice and an opportunity to be heard as to assessment and values as hereinbefore provided. Should the Board increase the value fixed by the County Assessor of Taxes of any real estate or personal property, due notice thereof shall be given to the owner or agent of such property by publication in a newspaper published in such county, or by posting a notice at the courthouse door, if there be no newspaper published in the county, at least fifteen days before the Board will be in session, to hear any reason that such persons may desire to give why the valuation fixed by the Board shall be changed. The Board of County Commissioners shall meet on the first Monday in August or September of each year for the purpose of hearing complaints from owners or agents of any real estate or personal property the value of which shall have been fixed by the Assessor, or changed by them, and for that purpose the Board shall sit as long as it may be necessary." Sec. 23, Chap. 5596, Acts of 1907, Sec. 525, Compiled Laws, 1914.

WHITFIELD, J. (after making the foregoing statement).

—A bill seeking to have declared invalid Chapter 7080, Acts of 1915, on grounds that it violated the State and Federal Constitutions was dismissed and an appeal was taken.

The statute creates "South Lake Worth Inlet District" in Palm Beach County and authorizes a tax not exceeding ten mills on all the taxable property in the district

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for the main purpose of constructing an inlet between the southern end of Lake Worth and the Atlantic Ocean, for the expressly stated statutory purpose of "the maintenance of the health of the inhabitants of the territory embraced in said district and for the convenience, comfort and welfare of said district and inhabitants thereof."

In the exercise of its inherent sovereign powers, the State may impose taxes to be used for a governmental purpose, and the only limitations imposed are those contained in the Federal and State Constitutions, designed to protect personal and property rights against arbitrary and oppressive exertions of governmental power. The extent of the taxing unit may be confined to a designated district or subdivision that may be or whose inhabitants may be directly and peculiarly benefited by the application of the tax money to the purpose contemplated. The object may be a matter designed to conserve the public health, comfort and convenience of the inhabitants and others in the particular community, and the mere fact that persons who do not share the tax burden may also be benefited by the undertaking does not affect the governmental power. It is not practicable or contemplated that public benefits shall be shared only by those who bear the burden thereof. The validity of a statute exerting the police power does not depend upon the absolute assurance that the purpose designed can in fact be or will most probably be fully accomplished as contemplated, or upon the certainty that it will best conserve the purpose intended or that the purpose designed is necessary or expedient for the general welfare. Matters of policy, expediency and wisdom are determined by the enactment of statutes; and their validity is dependent only upon actual conflicts with organic law.

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Where a statute levying a tax, in terms or in effect, states that it is for the purpose of conserving the public health, comfort and convenience, it may be sustained on that ground, if otherwise valid, unless it clearly appears from the Act itself or from a consideration of the circumstances and conditions within which it is to operate, that the law in reality has no fair relation to the public purpose stated or manifestly intended, or that it in effect violates organic law while superficially appearing to serve a lawful public purpose. Where a statute is not clearly violative of organic law in its expressed terms and legal effect, or its manifest purpose, it will not be held inoperative as in conflict with organic law merely because it may not be constitutionally applied under given conditions or merely because it is doubtful whether it will be as efficacious as was apparently contemplated, where circumstances are conceivable within which the law may validly operate or where its efficiency as intended may be realized in the course of human events. In testing the validity of a statute with reference to the facts and circumstances upon which it is to operate, the validity of the statute does not depend upon the preponderance of evidentiary considerations; but the statute stands unless it conclusively appears that there are or can be no conceivable circumstances upon which it can validly operate or that under no circumstances can it operate or be effective to accomplish the intended purpose, without violating organic rights. The propriety of action taken under the statute is subject to judicial review. While under the Constitution "no tax shall be levied for the benefit of any chartered company of this State," (Sec. 7, Art. IX), yet if a public improvement that is afforded by tax levies does merely incidentally benefit private corporations along with other persons, the Constitution is

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not violated in levying the tax for the public purpose, for the law contemplates that corporations shall participate in the burdens and benefits of taxations within appropriate limitations.

It is within the power of the legislature to establish a district of the character here considered as a governmental agency to effect the lawful public purpose of conserving the public health, comfort, convenience and welfare of the district and its inhabitants, and to impose an ad valorem tax therefor.

The statute expressly enacts "that the opening, cutting and maintenance of said inlet or waterway at some point within the District between Lake Worth and the Atlantic Ocean is hereby found and declared to be necessary for the maintenance of the health of the inhabitants of the territory embraced in said district and for the convenience, comfort and welfare of said district and the inhabitants thereof." That the location of said inlet or waterway shall be determined by said Board upon the approval and recommendation of the Chief Engineer of said Board and the methods for making the determinations are outlined in the statute.

It has not been conclusively shown that the health, comfort, convenience and welfare of the "District and the inhabitants thereof," cannot be conserved by the statutory operations, or that the scheme outlined by the statute for making the public improvement is impossible of accomplishment or that the statute will effectuate a purpose to benefit a private corporation.

The evidence does not clearly show that the conditions and circumstances within which the statute must operate will inevitably violate personal or property rights or any

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provision of constitutional law. Even if the contemplated benefits may not fully accrue from the expenditures of tax money, the statute is not thereby invalidated.

It does not clearly appear that the operation of the statute will necessarily impose a tax burden without due process of law. The district was formed by the legislature itself. The tax is uniform upon all the taxable property in the district, the maximum being stated in the statute. It cannot exceed ten mills on the dollar and it must be assessed and collected as other property. The county commissioners fix the valuations of all property for purposes of all taxation, after due notice and opportunity to be heard; and the millage cannot exceed the statutory limit. There is a discretion in "The Board of Commissioners of South Lake Worth Inlet District" as to the amount of the tax within the statutory limit; but this is no greater discretion than is given to other officers who levy a tax within fixed limits. This is not an acreage assessment upon property within a district formed by an administrative board, where the amount of the assessment levied by the administrative board should within the statutory limits be fixed only after a hearing as held in *Rodman v. Kyle*, 76 Fla. 79, 80 South. Rep. 300. The rule applicable here is similar to that announced in *Houck v. Little River Drainage Dist.* 239 U. S. 254, 36 Sup. Ct. Rep. 58. See also *Stockton v. Powell*, 29 Fla. 1, 10 South. Rep. 688; *Board of Com'rs. of Escambia County v. Board of Pilot Com'rs of Port of Pensacola*, 52 Fla. 197, 42 South. Rep. 697; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56. See also L. R. A. 1916-E 5.

The statute is not on its face an arbitrary exertion of governmental power oppressive of private rights; and it

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does not appear that its due operation will violate organic law. Illegality or abuse of authority in applying the statute may be remedied in due course of law.

As the taxes are to be assessed and collected as other taxes and as the general law provides for an opportunity to be heard before the assessment becomes final, there is no lack of due process of law in this particular.

Questions of benefit and of unlawful burdens do not arise in this case as the tax is uniform for a public purpose within the power of the legislature to prescribe. The wisdom, necessity, expediency, feasibility and probable success of the project are not subject to judicial review, where the statute is not clearly a violation or evasion of organic law with no substantial basis in a lawful public purpose within the scope of the police power. The broad powers conferred upon the local board may be unwise, but they are not shown to be violative of organic law, or that their exercise will inevitably invade personal or property rights that are secured by the constitution.

The statute has been amended providing for notice before the amount of the tax levy not limited by the amendment is certified for assessment and collection. Special Acts 1919, p. 157. The effect of this amendment has not been considered.

Decree affirmed.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J.,
concur.

Hill v. Peddy—Syllabus.

C. W. HILL, TRADING AND DOING BUSINESS AS HILL BROTHERS, Plaintiff in Error, v. B. C. PEDDY, Defendant in Error.

Opinion Filed December 13, 1920.

1. Plaintiff having been employed by defendant for a stated period, before its expiration, received a communication from him as follows: "As I promised Harry's wife I would give him the management of the store on his return before I employed you can you take the night shift and arrange to trade nights with him occasionally. As you know the position we are placed in with old employees I have no other choice than to ask this of you." Plaintiff interpreted this communication as a discharge and thereupon quit the service of defendant and sued for the amount of salary which he would have been entitled to had he rendered the service for the period of his employment. *Held*, that the language employed in the communication is not reasonably susceptible of the interpretation given it by plaintiff and that he is not entitled to a recovery upon the theory that it amounts to a discharge.
2. Where a verdict in plaintiff's favor is unsupported by the evidence it is the duty of the trial court to set it aside upon motion, and a failure to do so is error, for which the judgment will be reversed.

A Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Reversed.

Atkinson & Burdine, for Plaintiff in Error;

D. J. Heffernan, for Defendant in Error.

WEST, J.—In an action upon a contract of employment there was a verdict and judgment for plaintiff. Motion

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for a new trial was denied and defendant took writ of error.

The declaration contains several common counts in assumpsit and a special count on the contract in which it is alleged in substance that the defendant employed the plaintiff as manager of a cigar store in the city of Miami for a fixed period of time at a given salary per month; that plaintiff performed the duties assigned him as such manager and in all respects complied with the contract of employment; that defendant, without notice and disregarding his obligations under the contract, discharged the plaintiff, and although demand has been made therefor payment of the salary due under the contract has not been made except in part, leaving a balance due plaintiff for which he sues.

Pleas of the general issue to the common counts were filed and a special plea was filed in which it is averred that defendant did not discharge the plaintiff, but, on the contrary, plaintiff of his own accord quit the employment of defendant.

The overruling of defendant's motion for a new trial is assigned as error. Among the grounds of this motion is one that the verdict is contrary to the evidence and another that the verdict is unsupported by a preponderance of the evidence.

It appears from the testimony that the position given to plaintiff by defendant had been formerly held by one who was then in the military service of the United States Government; that during the period for which plaintiff alleges he was employed this former employee returned to Miami; that upon his return plaintiff received a communication from the defendant, which, omitting the formal commencement and conclusion, is as follows:

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“As I promised Harry’s wife I would give him the management of the store on his return before I employed you can you take the night shift and arrange to trade nights with him occasionally. As you know, the position we are placed in with old employees I have no other choice than to ask this of you.” This communication plaintiff, according to his testimony, interpreted as a discharge and thereupon quit the service of defendant.

At the trial the only proof offered was the evidence of the plaintiff and the evidence of the defendant. The material portions of plaintiff’s evidence is as follows: “I am the plaintiff in this case. I live at Buena Vista. I am presently engaged in the Retail Fish Business. I worked for Mr. C. W. Hill, who does business as Hill Brothers. He first offered me the position of manager at the 12th street store for a period of one year at a salary of \$125.00 per month, payable \$100.00 at the end of each month; he to hold back \$25.00 each month for a period of six months. I told Mr. Hill I would consider the matter and talk it over with my wife, also my employer, The Bowers Southern Dredging Company. I talked the matter over with the Bowers Southern Dredging Company, and after a few days’ illness I concluded it would be better to accept employment for night work than to continue outside in all kinds of weather during the coming winter months. I sent a message to him that I would see him as soon as I got up out of bed, and in about ten days after our first conversation, he wanted to change the contract to six months, which was agreeable to me. The terms were \$125.00 per month, of which \$100.00 would be paid in cash and the balance of \$25.00 per month at the end of the contract. I left him with the understanding that I was to work for him for six months and he would let me know

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the day I was to start working. After accepting Mr. Hill's offer I was offered employment with the Bowers Southern Dredging Company at Cutler at the wages of \$5.00 per day, with room and board, for an indefinite period; but I turned it down because I had agreed to go to work for Mr. Hill. A few days later the work in which I was engaged slackened off and I was laid off and went to Mr. Hill and told him about it. It was then agreed between Mr. Hill and myself that I would go to work on November 11th, which was the day the armistice was signed. When I got to the door to take my turn the door was locked on account of the holiday and I did not know when it was to be opened. Just before this it was agreed that I was to take the afternoon and night shift until he got more help and then I was to arrange so that I would not have to work at night, because I wanted to be at home nights with my family, as they live quite a distance from the store. After I waited for some time Mr. Hill came along, gave me the key and told me to open up, which I did. I worked on the night shift for two weeks, and then Mr. Hill hired Harry McNeil, after which I immediately changed to day shift. I needed some dental work done, so changed back with Harry for a few days. When I tried to change back again to day shift, I received a letter from Mr. Hill, and from the way it read, I concluded it was a discharge. * * * I came down town the next morning, but he could not be found. As soon as I could, I talked to him and showed him the check for \$100.00 that he had given me a few days before. I then told him that I interpreted his letter as a discharge and asked him for my money in full. There was nothing said at that time. I simply waited for about an hour and then he gave me check for something over \$130.00, I don't remember the exact amount. It was in full payment to date. I had no

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reason to believe that the store was being run in an unsatisfactory manner, as he had made no complaint to me."

So much of the testimony of the defendant as is material for a proper understanding of the case is as follows: "My name is G. W. Hill and I am the defendant in this cause. I have no partners in my business, but use the firm name of Hill Brothers merely as a trade name. I am engaged in the tobacco business, wholesale and retail, in Miami, Florida, and also operate cold drink stands in connection with the cigar and tobacco business. I own and operate three cigar stores in Miami, Florida; one on Avenue D, one on Twelfth Street, and one on the corner of Avenue C and Eleventh Street. During the year 1918 I became short of help on account of several of my employees going into the military service of the United States and I found it difficult to get competent men to replace them. In the fall of 1918, I don't remember the exact time, I talked with Mr. Peddy, the plaintiff, about taking a position at the Twelfth Street store. I don't remember whether I approached him or he approached me, but we talked the matter over and I told him if he wanted to work for me I would give him \$100.00 per month and if he would stay six months with me, I would give him \$25.00 per month additional, payable at the expiration of the six months period. I made the proposition in this way because he had quit me once before and I offered the \$25.00 per month additional provided he remained six months. I don't know anything about his contract with the Bowers Dredging Company, but I believe he reported for duty on the 11th of November, 1918; the day the armistice was signed. I did not employ him as manager of the Twelfth Street store. I manage my own business and do not have managers for any of my stores. I have never had a manager for any of the

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stores. I did not make any arrangement with the plaintiff as to his hours or what shift he was to take. I certainly expected him to work as directed by myself and to take any shift required. Shortly after Mr. Peddy went to work Harry McNeal, a former employee of the store, returned from the service and I gave him work at the Twelfth Street store. When McNeal went away, he had the day shift in the store. He applied to me for his old position and so I wrote the plaintiff the note filed in evidence as plaintiff's Exhibit 'A,' which speaks for itself. I wrote this note late one night when I was all tired out and inadvertently used the word 'management.' I do not know why I used this term, as no one had the management of the store except myself. The contract of employment between the plaintiff and myself was verbal and went no further than to give the plaintiff employment and to fix the wages or salary. The plaintiff had worked for me in the same cigar store before and knew what the duties were and what would be required of him. I did not write the note as a discharge or to vary the terms of the employment, but merely wanted to see if the hours of work between Peddy and McNeal could be satisfactorily adjusted. I did not deliver the note to the plaintiff, but left the same on his desk and presumed that he found it the next morning. I was surprised when I found that the plaintiff had quit the store. I had given the plaintiff his check for \$100.00 for a month's work, which he brought to me and asked if I thought that was right. He contended that he would have \$125.00 per month and asked me to settle with him for the full time he had worked. By the terms of the employment he was not entitled to the additional \$25.00 per month, because he quit before the six months was up, but rather than have any dispute about the matter I agreed to pay him for

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his full time at \$125.00 per month. In fact, I believe there was an error in the calculation and that he received more than was coming to him at that rate." The defendant here offered in evidence paid check for \$138.00, made by defendant payable to the plaintiff on the Bank of Bay Biscayne, bearing plaintiff's endorsement and stamped "paid."

This evidence is not sufficient to support a verdict of recovery by plaintiff. He mistakenly, we think, interpreted as a discharge the communication addressed to and received by him from defendant. A more reasonable interpretation would be that it was intended as a suggestion for an amicable adjustment of the hours of service between plaintiff and another employee of defendant in the store in which they were both employed, and the testimony of the parties tends to confirm this view. The rule here is that where a verdict in plaintiff's favor is unsupported by the evidence and is against the weight and preponderance of the evidence, it is the duty of the trial court to set it aside upon motion, and a failure to do so is error for which the judgment will be reversed. *Silcox v. Corsa*, decided this term; *Dickerson et al v. Lankford*, 69 Fla. 127, 67 South. Rep. 807; *C. H. & N. R. R. Co. v. Burwell & Hillyer*, 56 Fla. 217, 48 South. Rep. 213.

The question is not presented by the pleadings, but it appears from the evidence that after the termination of the employment of plaintiff by defendant a settlement was made with and accepted by the plaintiff in which he received payment for the service rendered by him to defendant.

The judgment will be reversed.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND ELLIS, J. J.,
concur.

Rickmers v. Tuckerman—Syllabus.

EDNA A. RICKMERS, *Plaintiff in Error*, v. H. G. TUCKERMAN, *Defendant in Error*.

Opinion Filed December 15, 1920.

1. Where a real estate broker agrees to accept \$300.00 as payment in full if he consummates the sale of the property only for \$30,000.00 cash, he is not entitled to a commission on the transaction, if the property is subsequently sold for a less price.
2. The contract of a real estate broker to negotiate and bring about a sale at a fixed price is not performed if the property is subsequently sold at a less price.

A Writ of Error to the Circuit Court for Dade County.

Judgment reversed.

Hudson, Wolfe & Cason, for Plaintiff in Error;

Shutts, Smith & Bowen, for Defendant in Error.

BROWNE, C. J.—H. G. Tuckerman, a real estate agent, brought suit and obtained a judgment against Mrs. Edna A. Rickmers for \$1,560.00 as commission for finding a purchaser for a piece of property belonging to Mrs. Rickmers which was sold for \$29,000.00.

On January 21, 1917, Mrs. Rickmers gave Mr. Ruckerman a memorandum in writing in these words: "For immediate acceptance I will take \$29,000.00 (twenty-nine thousand dollars) for the East half of Lot 12, Blk. 117 N. City of Miami." Then followed the terms upon which the sale was to be made, which are immaterial in the determination of the case.

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On the 22nd of January Mr. Tuckerman gave Mrs. Rickmers a memorandum in writing in these words: "I hereby finally agree to accept \$300.00 from Mrs. E. A. Rickmers as payment in full if I consummate the sale only for \$30,000.00 cash of the East half of Lot 12, Block 117 N. City of Miami."

These two documents establish that the offer of Mrs. Rickmers to sell the property for \$29,000.00 was limited "for immediate acceptance;" that the offer was not so accepted; that on the next day negotiations were still in progress, and Mr. Tuckerman entered into a different agreement with her, whereby he was to receive \$300.00 if he consummated the sale only for \$30,000.00 in cash. The second agreement extinguished the first.

It is admitted that the property was sold for \$29,000.00. The execution of these two documents and the fact that the property was sold for only \$29,000.00 are undisputed.

There is some slight discrepancy between the testimony of Mrs. Rickmers and Mr. Tuckerman about the details of the negotiation, but Mr. Tuckerman does not deny his agreement to accept only \$300.00 if he sold the property for \$30,000.00 and his testimony about the transaction shows that there was a consideration other than the commission that moved him to enter into this agreement. On this point he testified:

"There was no check in the letter. I had a specific agreement with Mrs. Rickmers for the sale of this specific property at this particular time. When I called on Mrs. Rickmers and made this offer and when she came down and submitted that offer in writing she also submitted to me a half sheet of paper on which she had written out without any previous agreement of any sort from me

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that I agreed to accept \$300.00 as my commission on this particular deal. I read that over and looked at Mrs. Rickmers considerably surprised and said, Why, Mrs. Rickmers, and she said I am almost ashamed to ask you to accept so small an amount, but another agent has offered to sell the property for that amount and in further consideration of other business we have in hand the commission on which will amount to many times this amount and as there is not much work attached to it, I thought you might accept it. I was negotiating at that time a lease the commission on which would amount to over \$5,000.00. I had been negotiating with Mrs. Rickmers on that Hippodrome corner for a lease of the property to Mr. Adair, president of the Universal Publishing Company of New York, and rather than let that be interfered with, I agreed to accept a paltry \$300.00."

Mrs. Rickmers' testimony places the case in a more favorable aspect towards herself, but it is unnecessary to refer to it here, as the written agreement of Mr. Tuckerman, supported by the consideration which he said induced him to enter into it, establishes very clearly that only in the event of the property being sold for \$300.00 if there was a "sale only for \$30,000.00," still as this is the agreement they were acting under when the sale was consummated. When he signed this agreement he knew that if the property sold for less than \$30,000.00 he would get no commission, and the sale for \$29,000.00 was made with full knowledge on his part of his situation.

Unexplained, the transaction may appear a bit unusual, but with his own explanation that he was anxious for this sale to go through because he thought it would help him in another business transaction that he was nego-

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tiating with Mrs. Rickmers, out of which he had prospects of making over \$5,000.00, it is quite a natural one.

The contention of the defendant in error that although Mr. Tuckerman's agreement was that he was to get \$300.00 if there was a "sale only for \$30,000.00," still as the property was sold for \$29,000.00, he was entitled to \$1,450.00, is without merit. So also is the contention of the defendant in error that because Mrs. Rickmers disclaimed any liability for commissions because the property did not sell for \$30,000.00, that Mr. Tuckerman's agreement was extinguished and left the matter as if there had been no agreement whatever, and that he was entitled to be paid a commission on the sale price.

Mrs. Rickmers did not repudiate the agreement. On the contrary, she stood squarely on it, but denied any liability under it.

The agreement in effect says: "If I sell for \$30,000.00 I will charge only \$300.00 for my services." It is silent about what he should receive if it sold for less than \$30,000.00.

The defendant in error is in the position of contending that although the agreement limits to \$300.00 the amount the agent should receive if the sale was for \$30,000.00, as it sold for less than \$30,000.00 he is entitled to a much larger commission. The logic of this contention, and of the verdict and judgment, is that although the agent was to receive only \$300.00 if the property sold for \$30,000.00, he was entitled to receive \$1,450.00, because it was sold to his customer for \$29,000.00.

It is inconceivable that a person desiring to sell a piece of property should agree to pay a broker a relatively small commission if he should find a purchaser for a stipulated

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sum, but would pay him about five times as much if the property was sold to his customer for a thousand dollars less. Parties may of course make such a contract, and if there were no question about what was meant, it would be enforced. We think, however, that Mr. Tuckerman's agreement is not open to that construction, but if it is, it is also capable of the other, and we should place upon it a reasonable and natural construction, and not one that is most unreasonable. The testimony of Mr. Tuckerman and Mrs. Rickmers not only justifies, but requires us to construe it as we have.

The plaintiff in error contends that the agreement was that if the property was sold for \$30,000.00 the agent was to receive \$300.00; that it sold for less than \$30,000.00 and he is therefore not entitled to \$300.00 or any other amount. The rule in *Varn v. Pelot*, 55 Fla. 357, 45 South. Rep. 1015, that the contract of a real estate broker to negotiate and bring about a sale at a fixed price is not performed if the property is subsequently sold at a less price, controls in this case.

The agreement of January 21st, whereby Mrs. Rickmers offered to sell for \$29,000.00 was suspended by the subsequent agreement to pay him \$300.00 if the property sold for \$30,000.00, and the last agreement is the one that governs in this transaction. It did not sell for \$30,000.00 but was sold for a less sum, and the agent's contract was not performed, and he has no claim for his services.

The judgment is reversed.

TAYLOR, WHITFIELD, ELLIS AND WEST, J. J., concur.

Hartman v. Gillean—Decision of Court.

W. P. HARTMAN, *Plaintiff in Error*, v. P. T. GILLEAN,
Defendant in Error.

Decision Filed December 16, 1920.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Hillsborough; F. M. Robles, Judge.

A. B. McMullen and C. Edmund Worth, for Plaintiff in Error;

Mabry & Carlton and William L. Pencke, for Defendant in Error.

PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Ullendorff v. Graham et al.—Syllabus.

P. ULLENDORFF, *Appellant*, v. MARY J. GRAHAM *et al.*, *Appellees*.

Opinion Filed December 16, 1920.

1. A deed conveying land to a named grantee, and deposited with a third person, to be by him delivered to the grantee upon the performance by the grantee of stated conditions of purchase, is an escrow.
2. After the deposit of an instrument with the escrow holder, the grantor has no control over it, unless the grantee defaults in complying with the conditions of the escrow.
3. An escrow holder is in effect a trustee of both parties charged with the performance of an express trust governed by the escrow agreement, which agreement is not required to be in writing, there being a deposit of the escrow paper.
4. When a grantee named in a deed of conveyance has complied with all the conditions of an escrow agreement, he is entitled to have the escrow instrument delivered to him; and upon refusal of the escrow holder to so deliver he may be compelled to do so.
5. Where third parties contracted for land with knowledge of an escrow transaction, covering the land, their claims may be cancelled in appropriate proceedings.

An Appeal from the Circuit Court for Dade County.

Order reversed.

Gramling & Clarkson, for Appellant;

M. S. Bobst, for Appellees.

WHITFIELD, J.—This suit was brought by P. Ullendorff

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against Mary J. Graham, Belle F. Neil, Rose Connett, Virginia Neil Connett and G. C. McClure. The amended bill of complaint alleges in substance that Mary J. Graham and Belle F. Neil are widows and are vested with the fee simple title to described land; that the owners desired to sell and complainant desired to purchase the land; that on April 19, 1919, the owners agreed to sell to complainant for \$25,000.00, payable \$200.00 cash at the time of the agreement, \$9,800.00 at the time of closing the transaction, \$15,000.00 to be evidenced by one note payable three years after date, with interest at 8% per annum, the note to be secured by a mortgage on the premises; that complainant paid \$200.00 to Mary J. Graham and Belle F. Neil, whereupon they entered into a written conveyance of the land to complainant, by warranty deed signed, sealed and duly acknowledged, naming a consideration of \$10.00 and other valuable considerations; that said deed was placed in the hands of G. C. McClure, to be by him held in escrow in lieu of any other receipts or agreements in writing; that McClure at the request of all parties agreed to hold said deed pending the procuring of an abstract of title to said premises and the ascertaining of the amount of the taxes, and the curing of any other defects, if any; the deed to be delivered to complainant upon his tendering and delivery to said McClure or the said Mary J. Graham and Belle F. Neil of \$9,800.00 (less the amount of the taxes and other liens on said property) and the said note for \$15,000.00, with mortgage to secure it as stated; that complainant procured an abstract of title to the property, but before he had an opportunity to make an examination thereof, the defendants, Rose Connett and Virginia Neil Connett, filed suit to enjoin Mary J. Graham and Belle F. Neil from conveying the premises to complainant, predicated such suit upon an alleged agreement

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signed by Mary J. Graham and Belle F. Neil, dated March 27th, 1919, but such suit was dismissed; that on April 29th, 1919, when complainant was informed of the dismissal of the injunction suit and that the title to the property was unincumbered, he caused to be tendered to the said G. C. McClure the moneys and the note and mortgage securing said note; that the said G. C. McClure, who then and there held the said deed in escrow to be delivered, stated that the said Belle F. Neil had been in his office the afternoon prior to the day of this tender to-wit: on the 29th day of April, 1919, and in her conversation with the said G. C. McClure, the said Belle F. Neil, although not recalling the said deed, instructed the said G. C. McClure that the said deed was not to be delivered to the said P. Ullendorff; that the said G. C. McClure informed the said Belle F. Neil that he held a deed in escrow for the benefit of P. Ullendorff and would have to make a delivery upon the presentation of the money and notes; the following morning the said G. C. McClure took possession of the said moneys, note and mortgage, aforesaid, and called on the said Mary J. Graham and informed her that he had the said moneys, note and mortgage, and the said Mary J. Graham requested the said G. C. McClure to hold the said deed and mortgage, notes and papers until after two o'clock in the afternoon on the said 29th day of April, 1919, at which time it was represented that this matter would be talked over; that complainant fully relied on the representations of the said Mary J. Graham, that she intended always to cause the said deed to be delivered by the said G. C. McClure to your orator, and that she would not attempt to have the delivery of the deed, which was then and there in escrow, delayed; notwithall of the representations, and notwithstanding the fact that the said deed was in escrow, and notwithstand-

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ing that the said Belle F. Neil and said Mary J. Graham had and still have the Two Hundred (\$200.00) dollars cash, which was paid to them, and notwithstanding that Belle F. Neil and Mary J. Graham nor anyone in their behalf, had informed your orator that they would or would not attempt to recall the deed, and notwithstanding that the said deed was never recalled, the said Belle F. Neil and Mary J. Graham did on the 29th day of April, 1919, before the said G. C. McClure was called by the said Mary J. Graham and said Belle F. Neil, to attend the said meeting, the said Mary J. Graham and Belle F. Neil, contrary to their agreement to convey the said property to your orator, and contrary to their agreement to accept the note and mortgage as aforesaid, and contrary to the escrow agreement by which the said deed was placed in the hands of G. C. McClure, the said Mary J. Graham and the said Belle F. Neil, did enter into an agreement with Rose Connett to convey to the said Rose Connett the property hereinabove described, that the said Rose Connett well knew at the time of the making of said last mentioned agreement that there was in escrow in the hands of the said G. C. McClure the deed hereinabove referred to conveying the said premises to your orator, and that the said Rose Connett is not an innocent purchaser, but a purchaser with full knowledge of all the foregoing, this whole transaction having been discussed in her presence on or about the 28th day of April, 1919, and she also having prior knowledge; that complainant has executed the said note and the said mortgage, and has made the tender aforesaid to the said G. C. McClure and has caused tender to be made to the said Mary J. Graham and Belle F. Neil before the execution by them of the agreement with the said Rose Connett as aforesaid; and that the said Rose Connett caused to be filed for record

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the said agreement and that the same was filed in the office of the Clerk of the Circuit Court of said Dade County on or about two o'clock in the afternoon of the 29th day of April, 1919, and thereby put a cloud upon the title to the said premises."

The prayer is that G. C. McClure, the escrow holder, be restrained from delivering the deed to any one, but to hold the same until the further order of the court, and that he shall thereupon be required to make delivery of the said deed to your orator; and that the defendants, Mary J. Graham and Belle F. Neil and Rose Connett, be restrained by the order of this Honorable Court from making any other deeds, agreements, or other instruments in writing affecting the title to the premises aforesaid, and that the said Mary J. Graham and Belle F. Neil or the said G. C. McClure, for the use and benefit of said Mary J. Graham and Belle F. Neil, be required by the order of this Honorable Court to accept the said money and the note and mortgage aforesaid herewith tendered in this court; and that the said agreement dated March 27th, 1919, signed by Mary J. Graham and Belle F. Neil, above referred to, be rescinded and declared null and void; and that the said agreement made by and between Mary J. Graham and Belle F. Neil, parties of the first part and the said Rose Connett, which said agreement was recorded in the office of the Clerk of the Circuit Court of said Dade County, on April 29th, 1919, as aforesaid, be declared null and void and that the said Clerk of the Circuit Court be authorized and instructed to mark on the record of the last mentioned agreement, "Canceled by order of Court," and that your orator may have such other and further relief in the premises as equity may require and to this Honorable Court shall seem meet.

A temporary restraining order was granted.

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By answer G. C. McClure, the escrow holder, admitted the allegations of the bill of complaint and deposited the money, note and mortgage in the registry of the court.

Mary J. Graham and Belle F. Neil demurred to the bill of complaint, the grounds being:

"1. There is no equity in said Bill.

"2. Complainant is not without adequate remedy at law.

"3. It appears from the Bill that there was no valid enforceable contract for the sale of the property described in the Bill existing between the parties at the time of the alleged deposit in escrow.

"4. No contract or memorandum in writing thereof is made out by the Bill of a nature sufficient to satisfy the Statute of Frauds.

"5. The Deed alleged to have been delivered in escrow does not appear to contain the price, terms or conditions of the sale and is therefore not a sufficient memorandum in writing to satisfy the Statute of Frauds.

"6. It is apparent on the face of the Bill that no irrevocable deposit of said Deed was made by Belle F. Neil and Mary J. Graham, with said G. C. McClure, but that on the contrary that the grantors would have to be further consulted before said deed could be delivered to complainant, which circumstances destroys the quality of escrow in said deposit and makes the depositor namely the agent of the grantor.

"7. It appears from the Bill that Mary J. Graham and Belle F. Neil had entered into a written agreement for the sale of said property prior to the time of their making the oral contract with complainant alleged in the Bill, and that complainant procured his transaction to be made in utter disregard of same.

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"8. It does not appear from the Bill that the Complainant was without knowledge of the agreement of March 27th, 1919, at the time he dealt with these defendants.

"9. Because the contract set forth in complainant's Bill and upon which complainant's claim for relief is based, is void and unenforceable.

"10. The said Bill shows on its face that it seeks to establish a parol contract for the sale of real property.

"11. Because said Bill shows on its face that the tender alleged to have been made by the Complainant was not so made before rescission by the defendant.

"12. Because the contract relied upon by the Complainant lacks mutuality."

An appeal was taken from an order sustaining the demurrer and dismissing the bill of complaint.

In this case the deed of conveyance to Ullendorff signed and sealed by the grantors and deposited with G. C. McClure, a third person, was an escrow, since it was to be delivered by the third party to the grantee therein upon the performance of a stated condition by the grantee. *Loubat v. Kipp & Young*, 9 Fla. 60; 10 R. C. L. 621; 21 C. J. 865. After the deposit of the instrument with the escrow holder, the grantors had no control over it, unless the grantee defaulted in complying with the conditions of the escrow. See 21 C. J. 870; *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. Rep. 467. The escrow holder was in effect a trustee of both parties charged with the performance of an express trust governed by the escrow agreement which agreement was not required to be in writing, there being a deposit of the escrow paper.

The instrument deposited was not a mere contract to convey land, but a deed signed, sealed and witnessed un-

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der the statute appropriate to conveying land upon which part payment had been made. The deposit of the instrument with the escrow holder was a conditional delivery of the deed to become effectual by delivery to the grantee upon the performance by him of the conditions that were subsequent to the escrow, but precedent to the ultimate delivery of the deed. The deed so delivered in escrow, after the grantors had accepted \$200.00 of the purchase price, gave to the intended grantee an equitable interest in the land, subject to be defeated if he failed to comply with the conditions of the escrow, but to become a complete equitable title upon performance of the escrow conditions by the grantee named in the deed of conveyance.

When the grantee named in the deed of conveyance had complied with all the conditions of the escrow agreement, he was entitled to have the escrow instrument delivered to him; and upon refusal of the escrow holder to so deliver he may be compelled to do so. *Brown v. Stutson*, 100 Mich. 574, 59 N. W. Rep. 238, 43 Am. St. Rep. 462. And where third parties contracted for the land with knowledge of the escrow transaction, their claims may be cancelled in appropriate proceedings. *Wilkins v. Somerville*, 80 Vt. 48, 66, Atl. Rep. 893, 11 L. R. A. (N. S.) 1183. See also *Drake v. Branning*, 66 Fla. 543.

This suit is materially different from that of *Foulkes v. Sengstacken*, 83 Oregon 118, 158 Pac. 952; 163 Pac. 311, and from other cases cited for appellee.

The court erred in sustaining the demurrer and in dismissing the bill of complaint.

Reversed for appropriate proceedings.

BROWNE, C. J., AND TAYLOR, ELLIS AND WEST, J. J., concur.

P. S. B. & T. Co. v. Landstreet—Syllabus.

PEOPLES SAVINGS BANK & TRUST COMPANY, A CORPORATION,
Plaintiff in Error, v. G. F. LANDSTREET, *Defendant in Error*.

Opinion Filed December 17, 1920.

1. Where the terms of a written contract are in any respect uncertain or doubtful and the parties thereto have by their conduct placed a construction upon the contract which is reasonable, such construction will be adopted by the court upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract.
2. The rule which gives effect to the intention of the parties to the contract may be invoked only in cases where there is doubt as to the meaning of the terms employed to express the contract. If the meaning is clear and free from ambiguity the contract will not be changed by an erroneous construction placed upon it by the parties thereto, and an erroneous construction by them will not prevent the court from giving the true construction to the contract, the province of the court being to give effect to the contract which the parties have made.
3. If the language employed in a contract is free from ambiguity effect will be given to such language, although it may result in placing a construction upon the contract under consideration different in its effect from the practical construction which may have been placed upon it by the parties themselves.
4. "In considering a contract of guaranty a liberal construction should be indulged to determine the intent of the parties, and when that intent is discovered the guarantor is entitled to a strict construction in the working out of the intent."

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5. Defendant agreed with a third party to pay drafts drawn on him through a designated bank and gave to him the following letter evidencing such agreement: "You may inform the Peoples Savings Bank of your city that I will honor your drafts drawn on me, amount not to exceed five hundred dollars, if this will be of service to you." *Held*, that the obligation assumed by defendant was limited to the amount stated in the letter and that the language employed did not create a continuing guarantee by defendant to pay drafts not exceeding this amount from time to time for an indefinite period.

A Writ of Error to the Circuit Court for Dade County;
H. Pierre Branning, Judge.

Affirmed.

Atkinson & Burdine, for Plaintiff in Error;

Shutts & Bowen, for Defendant in Error.

WEST, J.—Suit was brought by plaintiff in error to recover the sum of two drafts drawn in its favor upon defendant in error, payment of which was refused. An amended declaration was demurred to and the demurrer was sustained. Plaintiff in error declined to amend its declaration, whereupon judgment was entered by the court upon the demurrer in favor of defendant in error.

The several counts of the declaration are predicated upon the same transaction. The first count is typical and states the case of plaintiff in error. We insert it here, omitting formal parts:

"First. That heretofore, to-wit: on or about the fifth day of June, 1917, in consideration that the said plaintiff at the special intsanse and request of said defendant

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would advance and pay to one Albert C. Landstreet certain sums of money on certain drafts drawn by said Albert C. Landstreet on said G. F. Landstreet, the defendant promised that, the said defendant, would in such event pay and honor all of such drafts of said Albert C. Landstreet drawn on him, as presented, if no such draft amounted to more than Five Hundred Dollars, the said promise of the said defendant being in words and figures as follows:

“Miami, Florida, June 5-17.

“Mr. Albert C. Landstreet,

“Memphis, Tenn.

“Dear Sir:

“You may inform the Peoples Savings Bank of your city that I will honor your drafts drawn on me, amount not to exceed five hundred dollars, if this will be of service to you.

“Yours,

“G. F. LANDSTREET.”

“And plaintiff says that thereafter divers and sundry drafts of various amounts were drawn by the said Albert C. Landstreet on the said G. F. Landstreet for divers sums of money aggregating far more than Five Hundred Dollars, and that from time to time said sums were advanced by said plaintiff to the said Albert C. Landstreet, all of which were paid until, to-wit: the 31st of October, 1917, when the said Albert C. Landstreet drew a certain draft on the said G. F. Landstreet for the sum of Three Hundred Seventy-five Dollars and did present the same to this plaintiff, and the said plaintiff thereupon, relying on the said promises and undertakings of the defendant set out in the above writing, and confiding in the promises and agreements made by the said defendant,

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and being induced solely thereby, did pay over and deliver to said Albert C. Landstreet Three Hundred Seventy-five Dollars, lawful money of the United States of America and of the value of Three Hundrey Seventy-five Dollars, and thereupon the said draft was duly and properly presented to the said G. F. Landstreet, but he, the said G. F. Landstreet, refused to honor said draft and refused to pay the same and the amount now remains unpaid.

“Hence this suit and plaintiff claims One Thousand Dollars.”

One question only is presented for consideration. Counsel for plaintiff in error say in their brief that the pleadings have been so framed as to present the question of whether or not the paper writing referred to in the declaration is a continuing guaranty and whether the defendant in error by accepting drafts from time to time in excess of the amount stated in this paper writing without objection has estopped himself from denying his liability, and counsel for defendant in error agree that the question presented is whether the instument sued on is a continuing guaranty.

The contention is made that since, according to the allegations of the declaration, the drawee of the drafts himself construed the paper writing which is the basis of his alleged liability as a continuing warranty, as evidenced by his paying from time to time various drafts in excess of the amount stated, he should not now be permitted to take a contrary position, and in support of this contention the doctrine seems to be invoked that where the terms of a written agreement are in any respects uncertain or doubtful and the parties thereto have by their conduct placed a construction upon it

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which is reasonable, such construction will be adopted by the court to give effect to the intention of the parties. *Holmes et al v. Stearns Lumber & Export Co.*, 66 Fla. 259, 63 South. Rep. 449; *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 59 Fla. 322, 51 South. Rep. 547; *Scotch Mnfg. Co. v. Carr*, 53 Fla. 480, 43 South. Rep. 427; *Shouse, Admr., v. Doane*, 39 Fla. 95, 21 South Rep. 807.

This rule, however, is applicable only in cases where there is doubt as to the meaning of the terms employed to express the agreement. If the meaning is clear and free from ambiguity, the contract will not be changed by an erroneous construction placed upon it by the parties thereto, and an erroneous construction by them will not prevent the court from giving the true construction. The province of the court is to give effect to the contract which the parties have made. 9 Cyc. 590; *A. & St. A. Ry. Co. v. Thomas et al.*, 60 Fla. 412, 53 South. Rep. 510; *St. Paul & D. R. Co. v. Blackmar*, 44 Minn. 514, 47 N. W. Rep. 172; *Holston Salt & Plaster Co. v. Campbell et al.*, 89 Va. 396, 16 S. E. Rep. 274; *Sternberg et al. v. Brock et al.*, 225 Pa. 279, 74 Atl. Rep. 166. So that if the language employed in the agreement is free from ambiguity effect will be given to such language, although it may result in placing a construction upon the instrument under consideration different in its effect from the practical construction which may have been placed upon it by the parties themselves.

If there is room for construction the rule here is "that a liberal construction should be indulged to determine the intent of the parties, and that when that intent is discovered the guarantor is entitled to a strict construction in the working out of the intent." *Punta Gorda*

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Bank v. State Bank of Ft. Meade, 52 Fla. 399, 42 South. Rep. 846.

Several rules seem to have been formulated in other jurisdictions for testing the question of whether instruments similar in their purpose to the one under consideration constitute continuing obligations. These rules are stated and various authorities on the point assembled in a note to the New Jersey case of Newcomb v. Kleebe, reported in 39 L. R. A. (N. S.) 724.

If we assume that this court is committed by the case of Hawkins v. Mitchell, 34 Fla. 405, 16 South. Rep. 311, to the rule that the words of a guaranty are to be taken as strongly against the guarantor as the sense will admit, it would not affect the holding in this case, for the reason that the words of the instrument under consideration seem to us to be sufficiently clear and free from doubt in their meaning as to result in the conclusion that it was the purpose of the obligor to limit his liability under this obligation to the amount stated and that it was not his intent to create a continuing guaranty of this amount to run for an indefinite period of time. The court below, therefore, rightly held that the declaration did not state a cause of action and properly sustained the demurrer thereto.

The judgment will be affirmed.

WHITFIELD AND ELLIS, J. J., concur.

BROWNE, C. J., AND TAYLOR, J., dissent.

BROWNE, C. J., dissenting.

The opinion recognizes the doctrine that "where the terms of a written agreement are in any respect uncertain

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or doubtful and the parties thereto have by their conduct placed a construction upon it which is reasonable, such construction will be adopted by the court upon the principle that it is the duty of the court to give effect to the intention of the parties."

The opinion, however, avoids the conclusion that this doctrine leads to in the instance case, by stating that "this rule, however, is applicable only in cases where there is doubt as to the meaning of the terms employed to express the agreement if the meaning is clear and free from ambiguity."

Again the opinion says: "If we assume that this court is committed by the case of *Hawkins v. Mitchell*, 34 Fla. 405, 16 South. Rep. 311, to the rule that the words of a guaranty are to be taken as strongly against the guarantor as the sense will admit, it would not affect the holding in this case for the reason that the words of the instrument under consideration seem to us to be sufficiently clear and free from doubt in their meaning as to result in the conclusion that it was the purpose of the obligor to limit his liability under this obligation to the amount stated and that it was not his intent to create a continuing guaranty of this amount to run for an indefinite period of time."

The decision reached in this case is, therefore, predicated solely upon the finding that the words of the instrument under consideration are clear and free from doubt in their meaning.

Albert C. Landstreet was engaged in the automobile business in Memphis, Tennessee, where the plaintiff's bank was located; he did his banking business with plaintiff's bank, and, from time to time, drew drafts on G. F. Landstreet in Miami, Florida, which the bank would cash and

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place the proceeds to the credit of his account. Finally the bank notified him that it would not accept for deposit, or advance any further sum or drafts drawn, on G. F. Landstreet unless G. F. Landstreet would bind himself in writing to honor Albert C. Landstreet's drafts. Thereupon G. F. Landstreet wrote the letter which was delivered to the bank, that is the basis of this suit.

What was the purpose of this letter? Was it not to continue the course of dealing that Albert C. Landstreet had been having with the bank up to the time the bank required some guarantee from G. F. Landstreet that he would pay Albert C. Landstreet's drafts?

There is a very full discussion of guaranties in *Crist v. Burlingame*, 62 Barb. 351, where the leading authorities are cited, and there is no need for me to pad this opinion with them. I will indulge only in one citation from Mr. Justice STORY:

“If the language be ambiguous, and admits of two fair interpretations, and the guarantee has advanced his money on the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor, for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words by which the other party is misled to his injury.”

The Standard Dictionary defines ambiguity as “the quality of being ambiguous, obscure, or uncertain in meaning, especially *where either of two interpretations is possible*.” Ambiguous is defined as “capable of being understood in more senses than one.”

The letter guaranteeing payment of the drafts is in these words:

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“ ‘Miami, Florida, June 5-17.

“ ‘Mr. Albert C. Landstreet,

“ ‘Memphis, Tenn.

“ ‘Dear Sir:

“ ‘You may inform the Peoples Savings Bank of your City that I will honor your drafts drawn on me, amount not to exceed five hundred dollars, if this will be of service to you.

“ ‘Yours

“ ‘G. F. Landstreet.’ ”

I think it possible to place either of two interpretations upon this guaranty:

(1) That the guarantor would pay all “drafts” provided none exceeded five hundred dollars;

(2) That he would pay all drafts, until such time as they aggregated \$500.00.

The first interpretation was placed upon the letter by Albert C. Landstreet, who drew drafts, the aggregate amount of which far exceeded \$500.00. The bank officials who cashed the drafts placed the same interpretation upon it, and cashed drafts aggregating far more than \$500.00.

Banks do not give up their funds lightly or easily. No other class of persons probably have as much experience in interpreting written instruments of this character as bankers. It is hardly conceivable that a bank would part with sums of money aggregating far more than the amount it was authorized to pay, if the written instrument clearly and unambiguously limited the drawer to a lesser amount.

The writer of this dissent places the same interpretation on the guaranty as was placed on it by Albert C. Landstreet and the bank officials.

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An emphatic difference of opinion between persons supposedly equally capable of construing written documents, and with equal knowledge of good English, as to what written words mean, would seem to establish an ambiguity.

An ambiguity is not removed by dogmatic assertions that an instrument is clear and unambiguous, for the judicial mind often sees two sides to a question where but one can be seen by the advocate.

I do not contend that the letter under consideration is capable only of the interpretation that I place upon it, but yield to my brothers that it is capable of their interpretation also. They, however, will not concede that it is capable of the interpretation that I place upon it, or that "either of two interpretations is possible."

If, as I contend, the letter is ambiguous, we may look to the interpretation placed on it by all the parties to the transaction.

Albert C. Landstreet, to whom the letter was addressed, construed it as a continuing guaranty and drew drafts on his brother for amounts aggregating far more than \$500.00; the bank construed it as a continuing guaranty and paid drafts drawn by Albert C. Landstreet on his brother for sums aggregating far more than \$500.00, and G. F. Landstreet, the guarantor, paid "divers and sundry drafts of various amounts" "for divers sums of money aggregating far more than five hundred dollars," through a period extending from June 5th to October 31st, 1917.

In paying the drafts through so long a period, and after the aggregate amount far exceeded five hundred dollars, he clearly indicated to the bank that the limitation as to the "amount" related to any draft and not the aggre-

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gate amount of all drafts. Thus he placed his own construction on the language he used in his guaranty, and it is the same interpretation that all the parties concerned placed upon it.

The fact that he paid drafts running through a period of nearly five months demonstrates that he intended it to be a continuing guaranty.

I am forced to the conclusion that the only limitation to his guaranty was that *no one* draft should exceed five hundred dollars.

With this construction placed on the guaranty, it is my judgment that the declaration stated a cause of action, and the demurrer should have been overruled, and the judgment reversed.

TAYLOR J., concurs.

A. D. TOWNSEND, AS CHAIRMAN OF THE BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF LAFAYETTE, STATE OF FLORIDA, *Plaintiff in Error*, v. THE STATE OF FLORIDA EX REL C. C. HOWELL, *Defendant in Error*.

Decision Filed December 17, 1920.

A Writ of Error to the Circuit Court for Lafayette County; M. F. Horne, Judge.

Hal W. Adams, for Plaintiff in Error;

C. C. Howell, for Defendant in Error.

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PER CURIAM.—This cause having been heretofore submitted to the Court upon the transcript of the record of the judgment aforesaid, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

BROWNE, C. J., AND TAYLOR AND WEST, J. J., concur.

WHITFIELD AND ELLIS, J. J., dissent.

STANDARD GROWERS' EXCHANGE, *Plaintiff in Error*; v.
JAMES P. MARTIN, *Defendant in Error*.

Opinion Filed January 5, 1921.

1. A verdict will not be disturbed upon the ground that it is unsupported by the evidence, when the trial court after ordering a substantial remittitur concurs in the verdict so modified and there is substantial evidence to support the verdict as so modified.
2. A contract between the parties for the sale and purchase of the oranges growing upon the trees of several groves, under the terms of which the purchaser paid the sum of fifteen hundred dollars upon the execution of the contract, half of which sum was to be applied to the payment for the early bloom fruit, which was to be removed by him before December 25th, and half to the payment for the late bloom fruit to be removed in March, is entitled to a credit of the remaining seven hundred and fifty dollars upon a demand for pay

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ment for the fruit of the early bloom, which was not removed at the date agreed upon by the purchaser, and which was lost by injurious effects of a frost occurring in January.

3. The principle upon which a remittitur is directed to be entered is: the court considers the damages as returned by the jury to be excessive.
4. In a common law action where there has been a verdict for the plaintiff, a remittitur ordered by the trial court, but which is not deemed sufficient because of the failure of the court to allow the defendant credit for a certain sum of money held by the plaintiff for the defendant's use, this court will, acting under Section 1707, General Statutes, direct a further sum to be remitted by the plaintiff to the defendant.

A Writ of Error to the Circuit Court for Hillsborough County; F. M. Robles, Judge.

Judgment affirmed if remittitur is entered.

David & Giles, for Plaintiff in Error;

John B. Sutton, for Defendant in Error.

ELLIS, J.—The defendant in error, James P. Martin, brought an action upon a contract for the sale of citrus fruit against the plaintiff in error, whose name at that time was H. C. Shrader Company. There was a verdict for the plaintiff in the sum of one thousand dollars, a remittitur of five hundred dollars was ordered by the court and judgment entered for five hundred dollars. The defendant seeks a reversal here.

In substance the declaration alleges that the contract was entered into in September, 1916, for Martin's crop

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of citrus fruit then on his groves two miles north of Seffner, the price to be paid by the purchaser was one dollar per field box, the purchaser agreeing to move all fruit from the early or first bloom before Christmas, but was allowed until March 15th to remove all fruit from the late bloom. The purchaser, H. C. Shrader Company, paid fifteen hundred dollars when the contract was signed, half of which amount was to apply on the fruit removed in December, and the remaining half to be applied on the last shipments. Other payments were to be made as the fruit should be picked. It is alleged that the defendant failed to remove the early bloom fruit as it had agreed to do, and that a freeze came in February, 1917, destroying the fruit and that the defendant refuses to pay for it.

The contract as construed by both the parties is an agreement of sale whereby the purchaser pays for the fruit as it removes it, but agreed to remove all early bloom fruit before Christmas, although it was allowed until March 15th, of the succeeding year, to remove the late bloom fruit. If the fruit is destroyed by a freeze occurring before the limit of time allowed for its removal, the loss falls upon the seller. No claim was made by the plaintiff for the loss of the late bloom fruit, but his claim rests upon the allegation that the defendant did not gather and pay for the early bloom fruit as it agreed to do, but suffered it to remain on the trees contrary to its agreement, so that when the freeze came it was destroyed, and the loss should therefore fall upon the defendant.

The defendant pleaded that it removed all the early bloom fruit as it was required by the contract to do. There were other pleas, but it is unnecessary to mention them.

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The issue to be tried therefore was very clear, the difficulty being to prove what proportion of the oranges and grapefruit left on the trees after the freeze was of the early bloom. All fruit of that age should have been removed by the purchaser before Christmas, according to the terms of the contract. The early bloom appears upon the orange trees during the months of February and March and matures as early as November, so it appears from the evidence, but the fruit from the late bloom, which occurs in May or June, matures much later, about the month of March following. The blooming of the trees and maturity of the fruit seems, however, not to occur always during the above named period, but varies according to the seasons. According to some of the witnesses during the year 1916, in the territory in which the plaintiff's groves were located, there was practically no June bloom, and the late bloom occurred in April, and the fruit from that bloom constituted the greater part of the crop, and was considered as the late crop.

The evidence is not at all clear that the fruit which was left on the trees and which was destroyed by the cold weather was from the early bloom and could have been removed by the purchaser before Christmas. It appears from the evidence that the plaintiff had several groves the fruit of which the defendants purchased, but the fruit in one of the groves was not picked at all, and that when the freeze came there were about twelve or fifteen hundred boxes of fruit on the trees. The sons of the plaintiff testified that "except on the grove that had not been picked the rest was late bloom. I think most of the others was early bloom fruit." The defendant's own estimate of the entire crop was that about 70% was early bloom fruit and about 30% late bloom fruit. In view of this evidence, we are unable to say the verdict

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was unwarranted, and as the court approved the finding after directing a remittitur of five hundred dollars, we think it should not be disturbed upon the ground that it was unsupported by the evidence. See *Wilson v. Jernigan*, 57 Fla. 277, 49 South. Rep. 44; *Florida East Coast R. Co. v. Hayes*, 66 Fla. 589, 64 South. Rep. 274; *Robinson v. State*, 24 Fla. 358, 5 South. Rep. 6; *McDonald v. State*, 56 Fla. 74, 47 South. Rep. 485.

The second assignment of error rests upon the following instruction given by the court to the jury upon the plaintiff's request, which was duly excepted to by defendant:

"Gentlemen of the jury, the plaintiff is suing the Standard Growers Exchange, a corporation, successor to H. C. Shrader Company, a corporation, for breach of contract for the sale of fruit. Plaintiff was to receive under the terms of the contract of sale one (\$1.00) Dollar per field box for oranges, grapefruit and tangerines on the tree, the defendant agreeing to move all early or first bloom fruit before Christmas, 1916, and all late bloom fruit by March 15, 1917. The plaintiff claims that the defendant failed to remove the early bloom fruit as agreed by the contract, but that the defendant failed or refused to remove the early bloom fruit in accordance with the contract with the plaintiff; that because of its failure to remove it, the same was frozen on February 17th.

"If you believe from the evidence that the defendant refused or failed to remove any early bloom fruit contracted by the plaintiff to the defendant before Christmas, in accordance with the contract, then you should find for the plaintiff and assess his damages at whatever sum you may find he is entitled to under the evidence.

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The plaintiff is entitled to interest at the rate of 8% per annum from Christmas, 1916, on whatever amount you may find to be due him on a basis of \$1.00 per field box for the fruit not removed in accordance with the contract."

The criticism of this instruction by plaintiff in error is that it "eliminates the credit of \$750.00 to which the 'plaintiff' (defendant below) was entitled to under the contract sued on." That the effect of the instruction was to direct the jury to disregard the credit of \$750.00 to which the defendant was entitled.

The contract was made a part of the declaration and showed that \$1,500.00 had been paid by the defendant in advance to the plaintiff, half of which sum was to be applied on the fruit moved in December, and the remainder to be applied on "last shipments to be paid as fruit is picked and delivered to Tampa." Now the plaintiff's demand arose from the alleged failure of the defendant to remove the "early bloom fruit" according to its agreement, which provided that such fruit should be removed before Christmas. The failure to remove such fruit before that date was at defendant's peril, but it was in nowise liable for its failure to remove the "late bloom fruit" before March 15th of the following year, yet upon the face of the declaration considering the contract a part of it, the defendant had to his credit in the hands of the plaintiff on account of the contract the sum of seven hundred and fifty dollars. The jury found for the plaintiff in the sum of one thousand dollars, they were instructed that plaintiff was entitled to interest at the rate of 8% per annum from Christmas, 1916, on whatever amount they might find to be due to him on the basis of \$1.00 per field box for the fruit not removed in

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accordance with the contract. Whether any account of interest was taken and included in the verdict it is impossible to say. The court, however, directed a remittitur of five hundred dollars. Whether in doing so it took account of the credit of seven hundred and fifty dollars and interest thereon to which the defendant was entitled it is also impossible to determine.

The Standard Growers Exchange has begun its action against Martin for the recovery of the advance payment on the fruit of the late bloom. If it obtains credit in the instant case for that payment, or the question of whether it was entitled to receive it at all had been submitted in this case by a plea of recoupment or specific request for an instruction to the jury to allow it, then the judgment in this case could be successfully pleaded in the other as *res adjudicata*. But neither plea nor request for instruction to the jury concerning this claim of the defendant was filed or made by it. If the court had not directed a remittitur we would have considered that no account was taken in this case of the defendant's claim. And as the failure of the court to charge the jury upon the question of the defendant's claim in the absence of a request to charge upon that matter cannot be assigned for error, there would have been no cause for reversal. See *Carter v. Bennett*, 4 Fla. 283. There is no necessity for repeating the reason for this rule, it is fully given in the opinion of the court in the above cited case.

The principle upon which a remittitur is directed to be entered is, the court considers the damages as returned by the jury to be excessive, and as the court cannot substitute its judgment for that of the jury, it leaves the matter to the party recovering the verdict to agree upon the condition on which the court denies the motion for

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a new trial. We do not regard the verdict of one thousand dollars as excessive in so far as that sum is regarded as damages which accrued to the plaintiff because of the failure of the defendant to remove the "early bloom fruit," the only issue submitted; but if it was intended that that sum should be recovered over and above the amount of seven hundred and fifty dollars which the plaintiff has in his hand belonging to the defendant, then we regard the verdict as excessive to that amount.

So acting under authority of Section 1707 of the General Statutes of Florida, which empowers this court to give such judgment as the court below ought to have given, or as it may appear according to law, we will give the plaintiff below the option to retain his judgment if he will enter a further remittitur of two hundred and fifty dollars as of the date of the judgment, thus making full restitution to the defendant on account of the seven hundred and fifty dollars belonging to it in the hands of the plaintiff. See *Florida Ry. & Nav. Co. v. Webster*, 25 Fla. 394, 5 South. Rep. 714.

It is ordered that the judgment for five hundred dollars stand as of the date it was rendered if the plaintiff enter a further remittitur of two hundred and fifty dollars, but that failing to do this within thirty days after the mandate of this court is received by the Clerk of the Circuit Court, the judgment is reversed and a new trial granted.

BROWNE, C. J., AND TAYLOR, WHITFIELD AND WEST, J. J.,
concur.

Coachman v. Boyd—Decision of Court.

S. S. COACHMAN, *Plaintiff in Error*, v. W. C. BOYD, *Defendant in Error*.

Decision Filed January 6, 1921.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Pinellas; O. K. Reaves, Judge.

Herbert S. Phillips and Brandon & Gage, for Plaintiff in Error;

Whitaker, Himes & Whitaker, for Defendant in Error.

PER CURIAM.—This cause having heretofore been submitted to the court upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the Circuit Court be, and the same is hereby, affirmed.

All concur.

Cases Dismissed.

CASES DISMISSED BY THE SUPREME COURT
WITHOUT WRITTEN OPINIONS DURING THE
JUNE TERM, A. D. 1920.

J. D. Walling et al., Appellants, v. Ora Lee West et al.,
Appellees.

An Appeal from a Decree of the Circuit Court for the
County of Marion.

Appeal dismissed on motion of counsel for the respec-
tive parties.

L. W. Duval and *H. M. Hampton*, for Appellants;

Whitaker, Himes & Whitaker, for Appellees.

R. B. Rucker, Plaintiff in Error, v. H. J. Brett, Defend-
ant in Error.

A Writ of Error to a Judgment of the Circuit Court for
Okaloosa County.

Writ of Error dismissed on motion of counsel for Plain-
tiff in Error.

Leroy V. Holsberry, for Plaintiff in Error;

D. Stuart Gillis, for Defendant in Error.

Cases Dismissed.

S. B. Gailey et al., Plaintiffs in Error, v. Lucy M. Culler,
Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court
within and for the County of Brevard.

Writ of error dismissed by order of the court.

***James L. Mitchell,* for Plaintiffs in Error;**

***H. R. Morse,* for Defendant in Error.**

Jewell P. Wells et al., Appellants, v. Charles B. Williams
et al., Appellees.

An Appeal from a Decree of the Circuit Court within
and for the County of Polk.

Appeal dismissed on motion of counsel for Appellants;

***Hilton S. Hampton* and *Herbert S. Phillips,* for Appel-**
lants;

***McKay & Withers,* for Appellees.**

Willie Ann Rodly, Plaintiff in Error, v. The State of Flor-
ida, Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court
within and for the County of Duval.

Cases Dismissed.

Writ of Error dismissed on motion of the Attorney General.

Van C. Swearingen, Attorney General, for the motion.

Live Oak Products Company et al., Plaintiffs in Error, v.
T. J. Cone, Defendant in Error.

A Writ of Error to the Circuit Court within and for the County of Hernando.

Writ of Error dismissed on motion of counsel for defendant in error.

F. B. Coogler, for the motion.

W. H. Bethea, as Tax Assessor for Taylor County, Plaintiff in Error, v. State ex rel. Park Lumber Company, Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Taylor.

Writ of Error dismissed on motion of the Attorney General.

Van C. Swearingen, Attorney General, for Plaintiff in Error;

W. B. Davis, for Defendant in Error.

Cases Dismissed.

W. H. Bethea, as Tax Assessor for Taylor County, Plaintiff in Error, v. State ex rel. Taylor County Lumber Company, Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Taylor.

Writ of Error dismissed on motion of the Attorney General.

Van C. Swearingen, Attorney General, for Plaintiff in Error;

W. B. Davis, for Defendant in Error.

W. H. Bethea, as Tax Assessor for Taylor County, Plaintiff in Error, v. State ex rel. J. L. Towles et al., Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Taylor.

Writ of Error dismissed on motion of the Attorney General.

Van C. Swearingen, Attorney General, for Plaintiff in Error;

W. B. Davis, for Defendant in Error.

Cases Dismissed.

W. H. Bethea, as Tax Assessor of Taylor County, Plaintiff in Error, v. State ex rel. Burton Swartz Cypress Co., Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Taylor.

Writ of Error dismissed on motion of the Attorney General.

Van C. Swearingen, Attorney General, for Plaintiff in Error;

W. B. Davis, for Defendant in Error.

D. R. Armstrong, Appellant, v. J. Emmet Wolfe, as Judge of the Criminal Court of Record for Dade County, Appellee.

An Appeal from a Decree of the Circuit Court within and for the County of Dade.

Appeal dismissed on motion of the Appellee.

J. Emmet Wolfe, for the motion.

G. F. Finger et al., Appellants, v. Gainesville Planing & Coffin Company, a Corporation, Appellee.

An Appeal from Decrees of the Circuit Court within and for the County of Alachua.

Appeal dismissed on motion of counsel for Appellee. *Evans Haile*, for Appellants.

W. S. Broome, for Appellee.

Cases Dismissed.

Robert H. Ramsey et al., Appellants, v. May U. Conoley,
Appellees.

An Appeal from a Decree of the Circuit Court within
and for the County of Orange.

Appeal dismissed on motion of counsel for Appellees.

Arthur F. Odlin, for Appellants;

Robinson & Bridges and *Dickinson & Dickinson*, for
Appellees.

The City of Key West, Plaintiff in Error, v. Emma E.
Torano, Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court
within and for the County of Monroe.

Writ of Error dismissed on motion of counsel for
Defendant in Error.

Wm. H. Malone, for Plaintiff in Error;

W. Hunt Harris, for Defendant in Error.

John C. Davant, et al., Plaintiffs in Error, v. Peter L.
Weeks, Defendant in Error.

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Cases Dismissed.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Hernando.

Writ of Error dismissed on motion of counsel for Defendant in Error.

George C. Martin, for the motion.

The State of Florida and the County of St. Johns, Appellants, v. William H. Beardsley, et al., as Executors, etc., Appellees.

An Appeal from a Decree of the Circuit Court within and for the County of St. Johns.

Appeal dismissed on motion of counsel for Appellants.

G. W. Bassett, Jr., for the motion.

Henry Powell, Plaintiff in Error, v. The State of Florida, Defendant in Error.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Leon.

Writ of Error dismissed on motion of counsel for Plaintiff in Error, the Plaintiff in Error having died.

W. J. Owen and *W. C. Hodges*, for Plaintiff in Error.

Cases Dismissed.

Leonard Shaw, Appellant, v. N. B. Broward Drainage District, Appellee.

An Appeal from a Decree of the Circuit Court within and for the County of Broward.

Appeal dismissed on motion of counsel for Appellee.

Evans & Mershon, for Appellant;

Atkinson & Burdine, for Appellee.

Tampa Northern Railroad Company, Plaintiff in Error, v. Hugh Hale, et al., Defendants in Error.

A Writ of Error to a Judgment of the Circuit Court within and for the County of Hernando.

Writ of Error dismissed on motion of counsel for Plaintiff in Error.

Knight, Thompson & Turner and *Geo. C. Martin*, for Plaintiff in Error;

Fred L. Stringer and *Hugh Hale*, for Defendants in Error.

Clara Markillie, Appellant, v. Royal George Markillie et al., Appellees.

Cases Dismissed.

An Appeal from a Decree of the Circuit Court within and for the County of Duval.

Appeal dismissed on motion of counsel for Appellant.

Thomas W. Fielding, for Appellant;

A. V. Long and *P. L. Gaskins*, for Appellees.

CASE DISMISSED BEFORE THE CLERK IN VACATION DURING THE JUNE TERM, A. D. 1920.

B. C. Neeld et al., Appellants, v. E. I. Painter Fertilizer Co. et al., Appellees.

An Appeal from a Decree of the Circuit Court within and for the County of Pinellas.

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James Booth and *D. C. McMullen*, for Appellants.

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REGULATIONS TO ERADICATE TICKS WITHIN THE STATE'S POWER.

4. Compulsory eradication of ticks from cattle by "dipping" the cattle in solutions that destroy the ticks may be an appropriate and effective means of preserving the health and well-being of the cattle and the due enforcement of reasonable regulations to accomplish such a salutary purpose is within the sovereign powers of the State, whether exerted as a police taxation, eminent domain or other governmental power. *Whitaker v. Parsons*, 352.

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5. Abstract charges that do not conform to the evidence adduced, may be harmful error when the evidence does not certainly warrant a reasonable belief of the facts essential to sustain the verdict named. *S. A. L. Ry. Co. v. Royal Palm Soap Co.*, 800.

Appeal and Error.—(Continued.)**ABSTRACT INSTRUCTIONS TENDING TO CONFUSE JURY ARE REVERSIBLE ERROR.**

4. Instructions upon abstract propositions of law which are inapplicable to the evidence and tend to mislead and confuse the jury to the injury of the complaining party constitute reversible error. *Mach v. Mayo*, 372.

ALLOWANCE FOR ATTORNEY'S FEES NOT DISTURBED ON APPEAL WHERE IT APPEARS NOT EXCESSIVE.

8. The courts should exercise care and caution in decreeing attorney's fees to the end that only reasonable fees for services rendered be allowed, but where a cause is brought to an appellate court, not to have the amount allowed for attorney fees alone reviewed, but other questions as well, the allowance for attorney's fees will not be disturbed when it appears not to be excessive in view of services rendered in both the trial and appellate courts. *Natl. Union Fire Ins. Co. v. Cone*, 265.

APPEAL FROM FINAL DECREE IN CHANCERY OPENS MERITS OF CASE.

1. An appeal in chancery from a final decree opens for consideration by the appellate court the merits of the cause. *Jackson et al. v. Jackson*, 557.

APPELLATE COURT MAY DIRECT FURTHER REMITTITUR WHERE REMITTITUR ORDERED BY TRIAL COURT INSUFFICIENT.

4. In a common law action where there has been a verdict for the plaintiff, a remittitur ordered by the trial court, but which is not deemed sufficient because of the failure of the court to allow the defendant credit for a certain sum of money held by the plaintiff for the defendant's use, this court will, acting under Section 1707, General Statutes, direct a further sum to be remitted by the plaintiff to the defendant. *Standard Growers' Exchange v. Martin*, 864.

Appeal and Error.—(*Continued.*)

ASSIGNMENT BASED ON OBJECTION TO QUESTION WHICH RECORD DOES NOT SHOW WAS ANSWERED MUST FAIL.

4. Where a question propounded to a witness is not shown by the record to have been answered, an assignment of error based on an objection thereto must fail. *Natl. Union Fire Ins. Co. v. Cone*, 265.

CAUSE REMANDED TO TAKE FURTHER TESTIMONY WHEN CASE NOT FULLY DEVELOPED.

3. Where there is such an insufficiency of testimony as to preclude making a just decree, and the points are covered by the pleadings, and are such that there can be no doubt that testimony exists as to them, the cause will be remanded with directions to take further testimony on such points. *Dayton v. Patton*, 763.

CHANCELLOR'S FINDINGS NOT DISTURBED UNLESS CLEARLY ERRONEOUS.

7. The findings of a chancellor on the facts will not be disturbed by an appellate court unless such findings are clearly shown to have been erroneous. *Douglas et al. v. Ogle*, 42.

CHANCELLOR'S FINDINGS NOT REVERSED, UNLESS MANIFESTLY AGAINST EVIDENCE.

1. The findings of a Chancellor upon the evidence will not be disturbed unless such findings are clearly shown to be erroneous; but if a decree is manifestly against the weight of the evidence or contrary to the legal effect of the evidence, then it becomes the duty of the appellate court to reverse such decree. *Florida Natl. Bank of Gainesville et al v. Sherouse*, 405.

DECREE PRO CONFESSO RESULTING FROM DEFENDANT'S OWN NEGLIGENCE WILL NOT BE SET ASIDE; DISCRETION NOT REVIEWABLE.

3. The question of setting aside a decree *pro confesso* is addressed to the sound discretion of the court, which will be

Appeal and Error.—(Continued.)

exercised according to the circumstances of each case, but it should never be set aside when it is in consequence of defendants' own negligence, and the exercise of this discretion will not be interfered with by the appellate court unless there has been a gross abuse of that discretion. *Strickland et al. v. Jewell*, 221.

FINDING OF CHANCELLOR ON CONFLICTING, BUT SUFFICIENT, EVIDENCE NOT DISTURBED.

2. Where there is competent testimony to support the finding of a chancellor the decree will not be reversed on the evidence where, though conflicting, it is sufficient to support such finding. *Commercial Bank v. First Natl. Bank*, 685.

IN ATTACHMENT PROCEEDINGS, AFFIDAVITS, WRIT, MOTIONS AND ORDERS SHOULD BE BROUGHT UP IN RECORD PROPER.

In attachment proceedings the statutory affidavit, and the writ and motions addressed thereto, with the orders made thereon, should on writ of error be evidenced to the Appellate Court in the record proper and not in the bill of exceptions; and where such matters appear only in the bill of exceptions they cannot be considered by the Appellate Court. *C. A. Williams Co. v. Roberts & Geiger*, 471.

ON APPEAL FROM DECREE IN CHANCERY ON MERITS APPELLANT HAS BURDEN OF SHOWING ERROR.

1. In an appeal from a decree in chancery on the merits of a cause, the burden is upon the appellant to make it clearly to appear that the decree was erroneous in order to obtain a reversal. *Richardson v. Varn*, 517.

PARTITION DECREE, DETERMINING INTERESTS OF PARTIES, NOT FINAL DECREE.

3. The decree determining the rights and interests of the parties in a partition suit is not the final decree. *Stokely et al. v. Conner et al.*, 89.

Appeal and Error.—(Continued.)**POINTS ADJUDICATED NOT OPEN TO CONSIDERATION ON
SUBSEQUENT APPEAL.**

1. All the points adjudicated by an appellate court upon an appeal become the law of the case and are no longer open for discussion or consideration. *Commercial Bank v. First Natl. Bank*, 685.

REHEARING WILL BE DENIED UNLESS ERROR IS SHOWN.

Where a petition for a rehearing does not suggest anything which gives the court reason to apprehend that its judgment is erroneous a rehearing should be denied. *Stewart v. Preston et al.*, 479.

**RULINGS OF CHANCELLOR ARE PRESUMED CORRECT,
AND BURDEN IS ON APPELLANT TO SHOW ERROR.**

2. The rulings of the chancellor who tried the cause are presumed upon appeal to be correct and the burden is upon the appellant to make it clearly to appear that such rulings are erroneous, or the decree will be affirmed. *Jackson et al v. Jackson*, 557.

**VERDICT APPROVED BY COURT AFTER REMITTITUR NOT
DISTURBED.**

1. A verdict will not be disturbed upon the ground that it is unsupported by the evidence, when the trial court after ordering a substantial remittitur concurs in the verdict so modified and there is substantial evidence to support the verdict as so modified. *Standard Growers' Exchange v. Martin*, 864.

VERDICT ON CONFLICTING EVIDENCE CONCLUSIVE.

Where the evidence, though conflicting, affords a sufficient legal basis for a verdict, and no material or harmful errors of law or procedure appear, the judgment will be affirmed. *Thomas et al. v. Hayter*, 649.

Appeal and Error.—(*Continued.*)**VERDICT, UNSUPPORTED BY EVIDENCE, WILL BE SET ASIDE.**

2. Where a verdict in plaintiff's favor is unsupported by the evidence it is the duty of the trial court to set it aside upon motion, and a failure to do so is error, for which the judgment will be reversed. *Hill v. Paddy*, 832.

VERDICT WHOLLY UNSUPPORTED BY EVIDENCE SHOULD BE SET ASIDE; VERDICT WITHOUT EVIDENCE NOT SUSTAINABLE, THOUGH APPROVED.

2. Where a verdict in plaintiff's favor is wholly unsupported by the evidence offered, it is the duty of the court to set it aside upon motion, and a failure to do so is error for which the judgment thereon will be reversed. *Silcox v. Corsa*, 677.

ASSISTANCE, WRIT OF.**DEFENSE TO AN APPLICATION FOR.**

1. Nothing can be received as a defense to an application for a writ of assistance to affect the decree in aid of which the writ is asked, but the jurisdiction of the court in the original cause is open to question. *West 132 Feet et al. v. City of Orlando et al.*, 229.

PROCEDURE WHERE PETITIONER FAILS TO REPLY TO DEFENSES IN ANSWER, STATED.

3. If an answer to a petition for writ of assistance sets up a defense, and the petitioner fails to reply thereto, proper practice requires the court to take as true the facts stated in the answer, but if the answer shows no right on the part of the occupant to contest the petitioner's claim of right to possession, the court may ignore the answer and award the writ. *West 132 Feet et al. v. City of Orlando et al.* 233.

WHERE PETITION SHOWS PRIMA FACIE RIGHT, DEFENDANT MUST SET UP HIS CLAIM FULLY.

2. Where a petition for writ of assistance shows a *prima facie* right in petitioner, it becomes the duty of a defendant in

Assistance, Writ of.—(*Continued.*)

his answer, to set up his rights and claims fully and in such manner that his defense may be understood by the petitioner and by the court. *West 132 Feet et al. v. City of Orlando et al.*, 233.

ATTORNEY AND CLIENT.

ATTORNEYS' FEES IN FORECLOSURE ALLOWED TO MORTGAGEE, NOT ATTORNEY; ATTORNEY PERFORMED SERVICES WITHOUT AGREEMENT MAY RECOVER ON A QUANTUM MERUIT.

2. Ordinarily, in foreclosure proceedings in this State, attorneys where the mortgage provides for attorney's fees, accept the sum allowed by the court as their fee, but such fees are allowed the mortgagee and not the attorney. Such fee is intended as an indemnity to the mortgagee for expenditures necessarily made to protect his interests. Where an attorney performs services for which there is no agreement as to his fee, he will be entitled to recover *quantum meruit*. *United States Savings Bank v. Pittman et ux et al.*, 423.

ATTORNEY, WHOSE INTEREST IN A SUIT BECOMES ADVERSE, SHOULD WITHDRAW.

1. The relation of attorney and client is a relation of the highest confidential character, and if at any time in the course of litigation, the interests of the attorney in a suit become adverse or hostile to his client, he should cease to represent his client and give due notice of his withdrawal in order that his client may secure other counsel. *United States Savings Bank v. Pittman et ux et al.*, 423.

CLIENT MAY TERMINATE RELATIONS WITH ATTORNEY AT WILL.

2. A client has a right to terminate the relationship between himself and his attorney at his election, with or without cause, the existence or non-existence of valid cause for the discharge of the attorney bearing only on his right to compensation. The right of a client to change his attorney at will is based on necessity in view of both the delicate and

Attorney and Client.—(*Continued.*)

confidential relation between them and of the evil engendered by friction and distrust. *United States Savings Bank v. Pittman et ux et al.*, 423.

COURT OF EQUITY WILL TAX COSTS, INCLUDING REASONABLE ATTORNEY'S FEES, AGAINST THE ATTORNEY PROCEEDING AFTER HIS INTEREST BECOMES HOSTILE

5. If an attorney after there has been developed an adverse interest to his client proceeds with the cause and obtains decrees adverse to the interest of the client and there is an appeal to the Supreme Court, and other costs, rendered necessary by such action of the attorney, a court of equity will tax such costs, including a reasonable attorney's fee, against such attorney. *United States Savings Bank v. Pittman et ux et al.*, 423.

BASTARDS.

EXHIBITION OF CHILD TO JURY AND TESTIMONY REFERRING TO IT IS REVERSIBLE ERROR.

2. In a bastardy proceeding the exhibition of an infant in its mother's arms to the jury and using the infant as an informal exhibit by permitting reference to it by the witnesses, and thus enabling the jury to make comparisons between its features and those of the reputed father, constitutes reversible error. *Williams v. State ex rel. Taylor*, 286.

JUDGMENT ON CONFLICTING EVIDENCE NOT REVERSED, IN ABSENCE OF MATERIAL ERROR OF LAW.

Where there is competent evidence sufficient to support the verdict and no material or harmful errors of law appear, the judgment will not be reversed because of conflicts in the evidence. *Dykes v. State ex rel. Spivey*, 717.

SENTENCE TO JAIL AT HARD LABOR HELD ERROR.

1. In a proceeding in bastardy where the defendant is adjudged to be the father of the bastard child, and to pay a cer-

Bastards.—(Continued.)

tain sum of money for its support, it is error for the judge to sentence the defendant to jail at hard labor in default of compliance by him with the terms of the judgment. *Williams v. State ex rel. Taylor*, 286.

BILLS AND NOTES.**BURDEN CAST ON PLAINTIFF BY VERIFIED PLEA OF FAILURE OF CONSIDERATION.**

1. In an action upon a promissory note a plea of failure of consideration sworn to casts the burden of proof on plaintiff and this burden is not met by the introduction of the note alone without other proof. *Davis v. Leighton*, 594.

WANT OR FAILURE OF CONSIDERATION DEFENSE TO INDORSER AGAINST IMMEDIATE INDORSEE.

2. In an action solely between an endorser and his immediate endorsee of a negotiable instrument a want or failure of consideration may constitute a good defense. *Davis v. Leighton*, 594.

BROKERS.**BROKER'S AGREEMENT NOT PERFORMED IF PROPERTY SOLD AT LESS PRICE THAN THAT STATED IN THE AGREEMENT.**

2. The contract of a real estate broker to negotiate and bring about a sale at a fixed price is not performed if the property is subsequently sold at a less price. *Rickmers v. Tuckerman*, 839.

BROKER NOT ENTITLED TO COMMISSION WHERE PROPERTY SOLD FOR LESS THAN HIS CONTRACT REQUIRED.

1. Where a real estate broker agrees to accept \$300.00 as payment in full if he consummates the sale of the property only for \$30,000.00 cash, he is not entitled to a commission on the transaction, if the property is subsequently sold for a less price. *Rickmers v. Tuckerman*, 839.

BURGLARY.

"DWELLING HOUSE" DEFINED.

1. The term "dwelling house" in the law of burglary is defined as the apartment, building or cluster of buildings in which a man with his family resides. *Smith v. State*, 315.

"DWELLING HOUSE" NO LONGER SUCH, WHEN LEFT BY OCCUPANT WITHOUT INTENTION OF RETURNING.

A dwelling house loses its character as such within the meaning of Section 3231, General Statutes of Florida, providing punishment for breaking and entering a dwelling house, when the occupant leaves it without the intention of returning to occupy it as a dwelling. *Henderson v. State of Florida*, 491.

INDICTMENT FOR BREAKING AND ENTERING WITH INTENT TO COMMIT GRAND LARCENY HELD SUFFICIENT—INDICTMENT NEED NOT DESCRIBE PROPERTY INTENDED TO BE STOLEN.

1. An indictment alleging that the accused did "unlawfully break and enter a building of another, to-wit: a cotton house, the property of C., with intent to commit a felony, to-wit: grand larceny," sufficiently charges the statutory offense, and the defendant could not have been misled or embarrassed by the charge as made. The building is sufficiently described. An intent to commit a felony is alleged. The property intended to be stolen need not be described. *Ford v. State*, 781.

NECESSARY TO ALLEGE AND PROVE DWELLING HOUSE WAS DWELLING HOUSE IN FACT OF ANOTHER.

3. In order to uphold a conviction under the statute defining the offense and prescribing the penalty for breaking and entering a dwelling house, it must be alleged and proved that the dwelling house alleged to have been broken and entered was the dwelling house in fact of another at the time of the alleged breaking and entry. *Smith v. State*, 315.

Burglary.—(Continued.)**TEMPORARY ABSENCE OF OCCUPANT DOES NOT CHANGE CHARACTER OF DWELLING HOUSE.**

5. Temporary absence of the occupant does not take away from a dwelling house its character as such, but it must be made to appear that such occupant left the house *animo revertendi* in order to constitute an unlawful breaking and entry of the house during such absence burglary. *Smith v. State*, 315.

UNDER COMMON-LAW DWELLING HOUSE ENTERED MUST HAVE BEEN DWELLING HOUSE IN FACT.

4. In order that a house may come within the common law definition of burglary it must be in fact the dwelling house of another at the time of the breaking and entry; and the same is true under a statute punishing the breaking and entering of a dwelling house. The character of the house is generally immaterial if it is occupied as a dwelling. *Smith v. State*, 315.

CANCELLATION OF INSTRUMENTS.**ALLEGATIONS AS TO UNDUE INFLUENCE HELD SUFFICIENT.**

3. Where a bill contains allegations that deeds of conveyance were made without consideration, that the grantor and grantee were parent and child, and that undue influence was exerted over the grantor in the execution of the deeds, such allegations of ultimate facts or conclusions not being negatived by other specific facts alleged, a demurrer thereto may be properly overruled since, on the admission of the demurrer, it does not appear as a matter of law that undue influence was not used, and under such allegations a case entitling the complainant to relief may be made by appropriate and sufficient proof showing that in effect the grantee's will was substituted for that of the grantor in the execution of the deeds. *Pratt et al. v. Carns et al.*, 243.

Cancellation of Instruments.— (*Continued.*)**FACTS CONSTITUTING UNDUE INFLUENCE MUST BE PLEADED.**

1. A party seeking to have a deed declared to be void and delivered up to be cancelled on the ground of undue influence exerted over the mind of the grantor must plead the facts constituting such undue influence, the rule of pleading in such cases being the same as in cases of fraud. *Pratt et al. v. Carns et al.*, 243.

CARRIERS.**ONE SUING FOR LOSS OF TOMATOES FROM DELAY IN TRANSPORTING CRATES MUST SHOW TIMELY DELIVERY OF SUFFICIENT CRATE MATERIAL FOR USE BY HIM.**

2. In an action against a common carrier for special damages resulting to the plaintiff because of the negligent delay in the transportation of carrier crates to be used in shipping tomatoes and such damage consists of the spoiling of tomatoes in the field which became too ripe for shipment, the plaintiff should show that he had made reasonable provision for the shipment of the tomatoes by delivering to the carrier for transportation a sufficient quantity of crate material for use by him at the time when the tomatoes were ready for shipment. *Florida East Coast Ry. Co. v. Peters*, 382.

ONE SUING FOR SPECIAL DAMAGES FROM DELAY MUST ALLEGE AND PROVE NOTICE THAT DELAY WOULD CAUSE SPECIAL DAMAGES.

1. In an action against a common carrier for special damages on account of the loss of tomatoes because of delay in transporting crate material which was to be used in packing the tomatoes for shipment the plaintiff should allege and prove that at the time of the shipment of the crate material the carrier had notice that special damages to the consignee would result from a negligent failure to transport the crate material with reasonable promptness. *Florida East Coast Ry. Co. v. Peters*, 382.

Carriers.—(*Continued.*)

PASSENGER MAY RECOVER ONLY FOR NEGLIGENCE ALLEGED IN HIS DECLARATION.

3. In a case brought against the Director General of Railroads, operating a railroad in the State of Florida, and a locomotive engineer, the servant of such Director General, for damages for injuries resulting to the plaintiff solely because of the negligence of such engineer in the operation of a train which is alleged to have run into the train the plaintiff was entering, no recovery can be had for other negligence than that alleged in the declaration. *Williams v. Hines*, 690.

RECOVERY LIMITED TO NEGLIGENCE ALLEGED; NO PRESUMPTION OF NEGLIGENCE AGAINST OPERATOR OF RAILROAD OTHER THAN AS TO NEGLIGENCE ALLEGED.

4. A plaintiff is confined to the cause of action alleged in his declaration and cannot recover for any other act, or acts, of negligence than the act, or acts, alleged, and there is no presumption of negligence against one operating a railroad other than as to the act, or acts, of negligence alleged. *Williams v. Hines*, 690.

SEIZURE OF NARCOTICS PREVENTING DELIVERY EXEMPTS FROM LIABILITY FOR VALUE.

Where goods are delivered to a common carrier for transportation, and the consignor, being present where the goods are, attempts to sell and actually deliver the goods to a person there present, in violation of Federal law, an apparently lawful seizure of the goods by Federal officers as an incident to the arrest of the consignor for violating the Federal law in attempting to unlawfully sell and deliver the goods, exempts the carrier from liability for the value of the goods, where the seizure amounts to a *vis major*, and the carrier is not at fault in the premises. *Hammers v. Southern Express Co.*, 51.

CHATTEL MORTGAGES.**AGREEMENT EXTENDING TIME FOR PAYMENT OF OBLIGATION MUST BE SUPPORTED BY CONSIDERATION.**

2. In order to be effectual an agreement extending the time for the payment of an obligation must be supported by a sufficient consideration. A mere agreement for delay for no definite time and without consideration is not binding. *Mitchell v. Harper et al.*, 338.

AGREEMENT MAY SUSPEND RIGHT TO ENFORCE PAYMENT DURING PERIOD OF EXTENSION.

1. A valid agreement extending the time for the payment of an obligation has the effect of suspending the right to enforce payment during the period of such extension. *Mitchell v. Harper et al.*, 338.

CONSTITUTIONAL LAW.**ACTS NOT UNCONSTITUTIONAL WITHOUT A SHOWING OF HOW INTERFERING WITH COLLECTION OF STATE AND COUNTY TAXES.**

11. Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Laws of Florida, is not unconstitutional or invalid. It is claimed that the law interferes with the collection of the State and County taxes, and should be condemned. The claim is not well founded in fact, and counsel in their brief have offered no argument or authorities that would throw any light upon the subject. In the absence of any showing as to why and how the law interferes with the collection of State and County taxes, the court should not declare the law inoperative. *Bannerman v. Catts et al.*, 170.

CLAIM NOT MORALLY RIGHT MAY BE TAKEN AWAY BY RETROSPECTIVE LEGISLATION—MORAL ASPECT OF RIGHT CONSIDERED IN DETERMINING DUE PROCESS.

8. Generally speaking, the moral aspect of the right claimed may be given consideration in determining whether such right is protected by the due process of law clause of the Con-

Constitutional Law.—(*Continued.*)

stitution, and if not morally right, such claim may be taken away by legislation retrospective in its nature. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

COMPULSORY CATTLE-DIPPING ACT, PERMITTING ADOPTION BY ELECTION IN COUNTIES, DOES NOT DELEGATE LAW-MAKING POWERS.

15. The local option features of Chapter 7345, Acts of 1917, do not delegate to the counties the power to declare what the law shall be, or how it shall operate when it becomes effective; but it enables the counties respectively to determine by an election whether certain provisions of a complete statute shall become operative in the particular counties. This is not an unconstitutional delegation of law-making power. *Whitaker v. Parsons*, 352.

COMPULSORY CATTLE-DIPPING ACT DOES NOT ARBITRARILY INVADE PERSONAL OR PROPERTY RIGHTS; COMPULSORY CATTLE-DIPPING ACT DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWERS.

11. The provisions of Chapter 7345, Acts of 1917, relative to compulsory cattle dipping to eradicate tick infection do not in terms or purpose arbitrarily or illegally invade personal or property rights or delegate legislative powers in violation of the Constitution. *Whitaker v. Parsons*, 352.

CONSTITUTION IS LIMITATION OF LEGISLATIVE POWER—INVALIDITY OF LEGISLATION MUST BE CLEARLY SHOWN.

1. The State Constitution is a limitation upon the power of the Legislature, and unless legislation duly passed be clearly contrary to some expressed or implied prohibition in the Constitution the courts have no authority to pronounce it invalid. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

Constitutional Law.—(Continued.)**CONSTITUTIONAL GOVERNMENT AIMS TO SECURE INDIVIDUAL RIGHTS, SUBJECT TO PUBLIC GOOD.**

7. The purpose of constitutional government is to secure individual rights subject to valid regulations enacted in the interest of the public good. *Whitaker v. Parsons*, 352.

CONSTITUTIONAL PROVISIONS SHOULD BE INTERPRETED TO ACCOMPLISH THEIR PURPOSE.

6. Constitutional provisions are designed to effectuate practical government regulated by law; and they should be so interpreted as to accomplish and not to defeat their purpose or to lessen their efficiency. *Neisel v. Moran*, 98.

CONTRACTS SUBJECT TO GOVERNMENTAL REGULATIONS; ORGANIC LAW FORBIDS VIOLATIONS OF CONTRACTS LAWFUL WHEN MADE.

1. All contracts are subject to valid governmental regulations, and the organic law forbids a violation of the obligation of contracts that are lawful when made and that are not subject to the fair exercise of sovereign governmental power to conserve the general welfare. *Prairie Pebble Phos. Co. v. Silverman*, 541.

EX POST FACTO CLAUSE RELATES ONLY TO CRIMINAL PUNISHMENT.

4. The constitutional prohibition against the passage of *ex post facto* laws is confined to laws respecting criminal punishment and has no relation to retrospective legislation of any other character. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

FEDERAL CONSTITUTION LIMITS POWERS OF STATES.

2. The United States Constitution is also a limitation upon the powers of the States. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

Constitutional Law.—(*Continued.*)

FOR ARBITRARY OR ILLEGAL ACTION IN APPLYING STATUTE VIOLATING RIGHTS OF INDIVIDUALS THERE IS A REMEDY IN DUE COURSE OF LAW.

10. If rights of individuals are violated by arbitrary, unreasonable or illegal action in applying a statute, a remedy is available in due course of legal proceedings. *Whitaker v. Parsons*, 352.

GOVERNMENTAL POWERS OF STATE ARE LIMITED BY STATE AND FEDERAL CONSTITUTIONS.

5. All governmental powers of the State are subject to the limitations imposed by the Constitution of the State and to applicable provisions of the Federal Constitution; the organic provisions being designed to secure all individual rights that are consistent with efficient government to conserve the general welfare. *Whitaker v. Parsons*, 352.

INAPPLICABILITY OF STATUTE UNDER GIVEN CONDITIONS DOES NOT RENDER IT INVALID.

7. Where a statute is not clearly violative of organic law in its expressed terms and legal effect, or its manifest purpose, it will not be held inoperative as in conflict with organic law merely because it may not be constitutionally applied under given conditions or merely because it is doubtful whether it will be as efficacious as was apparently contemplated, where circumstances are conceivable within which the law may validly operate or where its efficacy as intended may be realized in the course of human events. *Hunter v. Owens et al.*, 812.

INDIVIDUAL RIGHTS ARE SUBJECT TO THE REGULATING POWERS OF GOVERNMENT.

6. Individual rights to life, liberty and property are in law acquired and enjoyed subject to the exercise of the regulating powers of government; and such rights are not protected by the Constitution from the due exercise of such governing powers. *Whitaker v. Parsons*, 352.

Constitutional Law.—(Continued.)**INVALIDITY OF STATUTE DEPENDS ONLY UPON ACTUAL CONFLICT WITH ORGANIC LAW.**

5. Matters of policy, expediency and wisdom are determined by the enactment of statutes; and their invalidity is dependent only upon actual conflicts with organic law. *Hunter v. Owens et al.*, 812.

LAWS CREATING EVERGLADES DRAINAGE DISTRICT AND FIXING ASSESSMENTS HELD NOT TO DEPRIVE LAND-OWNERS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

7. Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Acts of 1919, Laws of Florida, is not unconstitutional, and does not deprive the owners of the land in the said drainage district of their property without due process of law. See *Lainhart v. Catts*, *supra*. *Bannerman v. Catts et al.*, 170.

LAWS RELATING TO EVERGLADES DRAINAGE DISTRICT HELD NOT TO PERMANENTLY FIX RATE OF TAXATION THEREIN; TAXATION IS ALWAYS SUBJECT TO LEGISLATIVE CHANGES.

8. There is nothing in Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, relative to issuance of bonds and the assessment of taxes thereunder, nor in Chapter 7862, Laws of Florida, that would impair any of the rights of a purchaser of lands in the drainage district prior to the enactment of Chapter 7862, Laws of Florida, and there is nothing written in Chapter 6957, Laws of Florida, upon which it could be claimed that the rate of taxation on the land in the "Everglades Drainage District" were fixed permanently so that they could not be altered by direct Act of the Legislature in the passage of Chapter 7862, Laws of Florida. The matter of taxation is one which is always subject to change, and every person who purchases real estate in Florida, does so subject to the governmental power and authority to raise or change the taxes, to issue bonds, to create special tax school districts, to create special road and bridge districts, and to create drainage dis-

Constitutional Law.—(*Continued.*)

tricts, and any and all of which would have the effect of changing or increasing the rate of taxation. *Bannerman v. Catts et al.*, 170.

ONE ASSERTING UNCONSTITUTIONALITY OF STATUTE HAS BURDEN OF PROOF.

3. One who assails an act of the Legislature as unconstitutional has the burden of showing beyond a reasonable doubt that such act is in conflict with some designated provision of the State or Federal Constitution. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

PROPOSED AMENDMENT NEED NOT CONTAIN PROVISION FOR SUBMISSION TO ELECTORS OF STATE.

1. The State Constitution does not require that proposed amendments thereto shall contain express provisions for their submission to the electors of the State for approval or rejection. *Neisel v. Moran*, 98.

PROPRIETY OF ACTION UNDER STATUTE MAY BE SUBJECT TO JUDICIAL REVIEW.

9. The propriety of action taken under a statute is subject to judicial review. *Hunter v. Owens et al.*, 812.

PROVISIONS AS TO DUE PROCESS OF LAW ARE SUBJECT TO RESTRICTIONS—PROVISIONS AS TO EQUAL PROTECTION OF THE LAWS ARE SUBJECT TO LEGISLATIVE RESTRICTIONS.

8. The organic provisions requiring due process and equal protection of the laws in depriving individuals of life, liberty or property expressly recognize that the right to protect life, liberty and property is not absolute, but that it is subject to restrictions that must necessarily be imposed by the lawmaking power, "in order to secure the blessing of constitutional liberty," in "maintaining public order," to "insure domestic tranquillity," and "to promote the general welfare." *Whitaker v. Parsons*, 352.

Constitutional Law.—(*Continued.*)

"QUASI CONTRACTS" NOT WITHIN PROVISION FORBIDDING IMPAIRMENT OF OBLIGATION OF "CONTRACTS."

5. The constitutional provisions against impairing the obligation of a contract apply only to voluntary contracts and not to obligations imposed by law without the assent of the party bound. That class of obligations aptly styled "quasi contracts" are not embraced within said provisions. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

REGULATIONS FOR ANY GIVEN PURPOSE WITHIN DISCRETION OF LAWMAKING POWER.

3. The character and extent of appropriate regulations to be enforced for any given purpose are within the discretion of the lawmaking power, subject only to organic provisions securing private rights. *Whitaker v. Parsons*, 352.

RULE AS TO TESTING VALIDITY OF STATUTE WITH REFERENCE TO OPERATION STATED.

8. In testing the validity of a statute with reference to the facts and circumstances upon which it is to operate, the validity of the statutes does not depend upon the preponderance of evidentiary considerations; but the statute stands unless it conclusively appears that there are or can be no conceivable circumstances upon which it can validly operate, or that under no circumstances can it operate or be effective to accomplish the intended purpose, without violating organic rights. *Hunter v. Owens et al.*, 812.

SCOPE OF JUDICIAL REVIEW AS TO STATUTE NOT CLEARLY IN VIOLATION OF ORGANIC LAW STATED.

12. The wisdom, necessity, expediency, feasibility and probable success of a governmental statutory project are not subject to judicial review, where the statute is not clearly a violation or evasion of organic law and has substantial basis in a lawful public purpose within the scope of the police power. *Hunter v. Owens et al.*, 812.

Constitutional Law.—(*Continued.*)STATE AND FEDERAL CONSTITUTIONS DO NOT FORBID
RETROACTIVE LEGISLATION.

6. The passage of retrospective or retroactive legislation in Florida is not in terms forbidden by the State or Federal Constitutions, and such legislation is therefore valid unless invalid for some reason other than because of its retrospective nature. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*. 252.

STATE LEGISLATURE HAS PLENARY LAWMAKING POWER,
SUBJECT TO STATE AND FEDERAL CONSTITUTIONS.

4. The State Legislature has plenary law-making power subject only to the limitations imposed by the State and Federal Constitutions, and may enact any anticipatory statutes that are not forbidden by such Constitutions. *Neisel v. Moran*, 98.

STATUTE MAKING DIPPING OF CATTLE COMPULSORY TO
AVOID TICK INFECTION DOES NOT ABRIDGE PRIVILEGES
AND IMMUNITIES; DOES NOT DENY DUE PROCESS OF LAW;
DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

9. The provisions of Chapter 7345, Acts of 1917, relating to the compulsory dipping of cattle to avoid the evils of tick infection are within the regulating powers of the State, to the exercise of which power property rights are subject; and the statute itself does not abridge the privileges or immunities of any citizen or deny to any one due process or equal protection of the laws. *Whitaker v. Parsons*, 352.

STATUTE NOT INVALID UNLESS CONFLICTING CONSTITUTIONAL
PROVISION IS SPECIFICALLY POINTED OUT.

3. A statute cannot be judicially declared beyond the power of the Legislature to enact, unless some provision of the Constitution which is in conflict with it can be specifically pointed to. *Neisel v. Moran*, 98.

Constitutional Law.—(*Continued.*)

THOSE ASSERTING UNCONSTITUTIONALITY MUST PROVE IT BEYOND ALL REASONABLE DOUBT.

2. Those who assert the unconstitutionality of a statute have the burden of showing that beyond all reasonable doubt the statute inevitably conflicts with some designated provision of the Constitution. *Neisel v. Moran*, 98.

UNTIL OPERATIVE STATUTE DOES NOT CONFLICT WITH CONSTITUTION.

5. Conflicts between a statute and organic law do not arise until the statute becomes operative. *Neisel v. Moran*, 98.

VALIDITY OF EXERCISE OF POLICE POWER DOES NOT DEPEND ON ACTUAL ACCOMPLISHMENT OF PURPOSE.

4. The validity of a statute exerting the police power does not depend upon the absolute assurance that the purpose designed can in fact be or will most probably be fully accomplished as contemplated, or upon the certainty that it will best conserve the purpose intended or that the purpose designed is necessary or expedient for the general welfare. *Hunter v. Owens et al.*, 812.

"VESTED RIGHTS" IMPLY A VESTED INTEREST, WHICH IT IS RIGHT AND EQUITABLE THAT THE GOVERNMENT PROTECT.

7. Generally speaking, vested rights can not be disturbed by retrospective legislation, but in its application as a shield or protection, the term vested rights is not used in any narrow or technical sense or as importing a power of legal control, merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect and of which the individual could not be deprived arbitrarily without injustice. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

CONTINUANCE.**POWER OF COURT TO ORDER ADJOURNMENT STATED.**

2. Under Section 1489, General Statutes of 1906, the court may upon appropriate proceedings taken in the trial of a cause "where it may deem it right for the purposes of justice, order an adjournment for such time, and subject to such terms and conditions, as to costs and otherwise, as it may see fit." *Bacon v. Feigel et al.*, 566.

CONTRACTS.

See Constitutional Law.

ARBITRATION AGREEMENT ATTEMPTING TO OUST THE COURTS OF THEIR JURISDICTION IS INVALID.

1. In an action for damages for breach of a warranty a plea which avers that the parties had agreed to settle by arbitration any differences arising from the transaction is bad because the averred agreement is an attempt to settle by arbitration the right to maintain an action for breach of contract and thus oust the courts of their jurisdiction. *Steinhart v. Con. Gro. Co.*, 531.

CONSTRUCTION BY PARTIES OF DOUBTFUL AGREEMENT WILL BE ADOPTED BY COURT, IF REASONABLE.

1. Where the terms of a written contract are in any respect uncertain or doubtful and the parties thereto have by their conduct placed a construction upon the contract which is reasonable, such construction will be adopted by the court upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract. *Peoples Savings Bank & Trust Co. v. Landstreet*, 853.

INADEQUACY OF CONSIDERATION AND MORTGAGOR'S MENTAL WEAKNESS AFFORD GROUND FOR EQUITABLE INTERFERENCE.

5. Inadequacy of consideration, coupled with such a degree of mental weakness as would justify the inference that advan-

Contracts.—(Continued.)

tage had been taken of that weakness, will furnish sufficient ground for equitable interference. *Douglas et al. v. Ogle*, 42.

INADEQUACY OF CONSIDERATION, WITH INEQUITABLE CIRCUMSTANCES, JUSTIFIES CANCELLATION.

4. Inadequacy of consideration in connection with other inequitable circumstances will justify the cancellation of an instrument. *Douglas et al. v. Ogle*, 42.

INTENTION OF PARTIES, AS SHOWN BY THEIR CONSTRUCTION OF CONTRACT, MAY BE INVOKED ONLY TO RESOLVE AMBIGUITY.

2. The rule which gives effect to the intention of the parties to the contract may be invoked only in cases where there is doubt as to the meaning of the terms employed to express the contract. If the meaning is clear and free from ambiguity the contract will not be changed by an erroneous construction placed upon it by the parties thereto, and an erroneous construction by them will not prevent the court from giving the true construction to the contract, the province of the court being to give effect to the contract which the parties have made. *Peoples Savings Bank & Trust Co. v. Landstreet*, 853.

LACK OF MUTUALITY DOES NOT INVALIDATE, WHERE PARTY AGAINST WHOM MUTUAL COVENANTS ARE NOT ENFORCEABLE HAS PERFORMED.

1. In a case where a contract containing mutual covenants is not enforceable as against one of the parties by reason of some disability, yet such party performs all the obligations on his part to be performed, the objection of lack of mutuality does not lie. *LeNoir v. McDaniel*, 500.

MERE WEAKNESS OF MIND IS NO GROUND FOR SETTING ASIDE AGREEMENT.

3. Mere weakness of mind unaccompanied by any other inequitable incident if the person has sufficient intelligence to understand the nature of the transaction, and is left to

Contracts.—(*Continued.*)

act upon his own free will, is not a sufficient ground to set aside an agreement. *Douglas et al. v. Ogle*, 42.

NATURE, VALIDITY AND INTERPRETATION GOVERNED BY LEX LOCI—REMEDIES GOVERNED BY LEX FORI.

1. The nature, validity and interpretation of contracts are governed by the *lex loci* of the country where the contracts are made or are to be performed; but the remedies are governed by the *lex fori*. *Brown v. Case*, 703.

NOTICE OF INTENT TO RESCIND ESSENTIAL.

3. Where rescission of a contract is not by mutual consent, a party thereto who is not himself in default and who elects to rescind must, in order to affect rescission, give notice to the opposite party of his intention to rescind with reasonable time thereafter within which to comply with the contract. *Felt v. Morse*, 154.

PLEA OF GENERAL ISSUE CASTS BURDEN OF PROOF ON PLAINTIFF.

1. Under the plea of the general issue in debt upon simple contract, express or implied, the burden is upon the plaintiff to prove every material fact which is alleged in his declaration. *Newcomb et al. v. Belton*, 570.

PRESUMPTION AND BURDEN OF PROOF AS TO CONTRACT EXECUTED FOR INSUFFICIENT CONSIDERATION.

6. Where a contract is executed on an insufficient consideration by one enfeebled in body and mind, a presumption of fraud arises, but the burden to establish the predatory conditions to the presumption is on him who would avoid the contract. *Douglas et al. v. Ogle*, 42.

WHERE CONTRACT UNAMBIGUOUS, CONSTRUCTION DIFFERENT FROM THAT OF THE PARTIES MAY BE PLACED THEREON.

2. If the language employed in a contract is free from ambiguity effect will be given to such language, although it may

Contracts.—(Continued.)

result in placing a construction upon the contract under consideration different in its effect from the practical construction which may have been placed upon it by the parties themselves. *Peoples Savings Bank & Trust Co. v. Landstreet*, 853.

CORPORATIONS.**CHANGE IN NAME HAS NO EFFECT ON IDENTITY.**

3. The change in the name of a corporation has no more effect upon its identity as a corporation, than the change in the name of a natural person has upon his identity. *Stewart v. Preston et al.*, 473.

CHANGE IN NAME HAS NO EFFECT UPON ITS RIGHTS, PROPERTY OR LIABILITIES.

1. The change in the name of a corporation has no effect whatever upon its property, rights or liabilities. It continues as before, responsible in its new name for liabilities previously contracted or incurred, and has the right to sue on contracts made or liabilities incurred to it before the change. *Stewart v. Preston et al.*, 473.

NAME OF PARTY INDICATING USUAL SUBJECTS OF CORPORATION IMPORTS A CORPORATION.

7. Where the name of a party is manifestly a charitable, educational or commercial, manufacturing or financial one, such as are usual subjects of incorporation and not one common to copartnerships or individuals, it should import a corporation, and whether it does or not should as a general rule be left to judicial knowledge. *Stewart v. Preston et al.*, 473.

SHOULD SUE AND BE SUED BY CHANGED NAME.

2. After the name of a corporation has been changed it should, by proper averments to show the change, sue and be sued by its new name. *Stewart v. Preston et al.*, 473.

COSTS.**TRIAL COURT SHOULD NOT FIX ATTORNEY'S FEES IN ANTICIPATION OF APPEAL OR ERROR.**

9. Trial courts should not fix the amount of attorney's fees in anticipation of a possible or probable appeal or writ of error. *Natl. Union Fire Ins. Co. v. Cone*, 265.

COUNTIES.**CONDITIONS UNDER WHICH RIGHT OF ACTION PROVIDED BY STATUTE RELATING TO CONTRACTOR'S BONDS ARISES STATED.**

3. The right of action provided by the statute in behalf of any person, firm or corporation supplying labor or material to a contractor or sub-contractor engaged in the construction of public works is secured only when a bond of the contractor is filed containing the additional obligations required by the statute that the contractor or contractors shall promptly make payment to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract. *McCrary Co. et al. v. Dade County*, 652.

PUBLIC CONTRACTOR'S BOND HELD NOT TO ENTITLE MATERIALMEN TO SUE THEREON.

4. A bond filed by a contractor who has assumed a contract for the construction of public works, which does not contain such obligation, but does contain a condition that he will carry out all the terms of the contract, and such contract contains a clause that the contractor will pay all just claims for materials and supplies that might be incurred by him in the performance of the work, is not such a bond as is required by the statute to protect third persons from whom the contractor or sub-contractor may obtain materials or labor, and no right of action is secured to such persons against the contractor and his sureties thereby. *McCrary Co. et al. v. Dade County*, 652.

RULE OF PLEADING IS MATERIALMAN'S ACTION ON CONTRACTOR'S BOND STATED.

1. In an action by a material man on a bond given by a contractor to the county under the provisions of Chapter 6867,

Counties.—(*Continued.*)

Laws of 1915, who has entered into a contract for the construction of public works, neither the plea of "never was indebted" nor the plea of "never promised" is applicable where the materials alleged to have been furnished by the material man were supplied to a subcontractor. *McCrary Co. et al. v. Dade County*, 652.

THOSE FURNISHING MATERIALS TO CONTRACTOR MAY SUE ON STATUTORY BOND GIVEN FOR PAYMENT OF MATERIALS.

2. Chapter 6867, Laws of 1915, requiring that all bonds taken by the State or county for the performance of a contract for the construction of any public work shall contain a provision that the contractor or contractors shall promptly make payments to all persons supplying him or them any labor or material, and further providing that suit may be brought in the name of the obligee in the bond for the use and benefit of any person, firm or corporation who shall have furnished any labor or material in the prosecution of the said work against the contractor and sureties on the bond to recover the amount due such person, firm or corporation on account of labor or materials so furnished, applies in a case where labor or materials is furnished to a sub-contractor, and in such case suit may be maintained against the contractor and sureties on the bond to recover the value of the labor and materials so furnished. *McCrary Co. et al. v. Dade County*, 652.

COURTS.

WHEN COURT CANNOT LOOK BEHIND RECORD TO IMPEACH JURISDICTION—COURTS BOUND TO NOTICE LIMITS OF AUTHORITY.

5. Courts are bound to take notice of the limits of their authority, and if want of jurisdiction appears at any stage of the proceeding, original or appellate, the court should notice the defect and enter an appropriate order, but where the jurisdictional steps prescribed by statute in a proceeding in view appear on the face of the record to have been regularly taken, the court has no power to look behind the record into al-

Courts.—(*Continued.*)

leged extrinsic facts tending to impeach the jurisdiction, at the instance of one who shows no title or interest in the property other than bare possession, and who seeks to raise such question on behalf of others. *West 132 Feet et al. v. City of Orlando et al.*, 233.

COVENANT, ACTION OF.

DECLARATION STATING ESSENTIALS OF CAUSE OF ACTION, SUSTAINED BY EXHIBITS, HELD NOT DEMURRABLE.

Where the allegations of a declaration state the essentials of a cause of action and the exhibits to the declaration in effect sustain the allegations, a demurrer to the declaration should be overruled. *Bethea v. Houck*, 630.

CREDITORS' SUIT.

DEFAULTING PURCHASER OF LAND HELD TO HAVE NO EQUITABLE INTEREST SUBJECT TO CREDITOR'S BILL, WHERE PURCHASE COMPLETED BY WIFE.

2. H agreed in writing to buy certain lands from S, part of the purchase price was paid in cash, and the remainder was to have been paid in several yearly installments. He entered into possession of the lands and made improvements, but was unable to complete his payments. His wife with money of her own and that which she borrowed from relatives and friends took over the contract to purchase the lands and paid the amount due, which with principal and interest amounted to the purchase price originally agreed to be paid by H. *Held*: That H had no equitable interest in the land which could be subjected to sale under a creditor's bill for the payment of his judgment debts. *Holly et al. v. Gainesville Natl. Bank*, 523.

JUDGMENT CREDITOR MUST EXHAUST LEGAL REMEDIES BEFORE SUBJECTING DEBTOR'S EQUITABLE ASSETS.

1. A judgment creditor before proceeding in equity to subject equitable assets of his debtor to the payment of the judg-

Creditors Suit.—(*Continued.*)

ment debt must pursue his legal remedies to every available extent and have a return of the execution that no goods of the debtor are to be found, if such is the case. *Holly et al. v. Gainesville Natl. Bank*, 523.

CRIMINAL LAW.

APPROVED VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE WILL NOT BE DISTURBED.

1. Where there is substantial evidence which if the jury believes would sustain the verdict, and the trial judge refuses to set it aside, the verdict will not be disturbed. *Witt et al. v. State*, 38.

CONVICTION NOT DISTURBED FOR INSUFFICIENCY OF CONFLICTING EVIDENCE, IF COMPETENT EVIDENCE EXISTS.

1. Although there may be conflicts in the evidence, if there is sufficient competent evidence of all the facts legally essential to support a verdict of conviction and there is nothing in the record to indicate that the jury was influenced by any consideration outside the evidence in arriving at the verdict returned, the judgment will not be disturbed by an appellate court on the ground of the insufficiency of the evidence to support the verdict. *Hamlin v State*, 217.

CONVICTION NOT REVERSED FOR TECHNICAL ERROR IN EVIDENCE.

1. A judgment of conviction will not be reversed even if technical errors have been committed in rulings on questions of the admissibility of evidence or in charges given or refused or in other matters of procedure where the evidence of guilt is clear and no fundamental rights of the defendant have been violated. *McQuagge v. State*, 768.

CONVICTION, SUSTAINED BY EVIDENCE, EXCLUSIVE OF ANY IMPROPERLY ADMITTED, WILL NOT BE REVERSED.

Where there is ample evidence to sustain a verdict of guilty, without considering evidence asserted to have been improper.

Criminal Law.—(Continued.)

erly adduced, a judgment of conviction will not be reversed, where the error, if any, was rendered harmless by the testimony of the defendant, no material or harmful errors appearing in the record. *Neicarta v. State of Florida*, 493.

CONVICTION SUSTAINED BY EVIDENCE AFFIRMED IN ABSENCE OF HARMFUL ERRORS.

2. Where there is ample evidence to sustain a conviction and no material or harmful errors of law or procedure appear, the judgment will be affirmed. *Habersham v. State*, 240.

COURT MUST CHARGE LAW APPLICABLE TO FACTS PROVEN; WITHOUT REQUEST TO CHARGE PARTY CANNOT ASSIGN OMISSION AS ERROR.

3. It is the duty of the trial court to instruct the jury on the law applicable to the facts proven, and a refusal to do so when asked will be error; but if a party wishes to avail himself of the omission of the court to charge the jury on any point in the case, he must ask the court to give the instruction desired; otherwise he will not be permitted to assign the omission as error. *Witt et al. v. State*, 38.

DESCRIPTION OF STOLEN PROPERTY HELD TO SUSTAIN CONVICTION AFTER REVERSAL.

Upon an indictment charging the larceny of "one bull, one steer, one cow," where a conviction of the larceny of "one bull" is reversed because the verdict was not supported by the evidence, and on another trial that is expressly confined to the larceny of "one bull," a conviction of the larceny of "one bull" will be sustained on writ of error where there is ample evidence to support the verdict, no errors of law or procedure appearing. *Higginbotham v. State*, 306.

ERRONEOUS RECITAL OF OFFENSE IN SENTENCE DOES NOT VITIATE JUDGMENT, WHERE RECORD DISCLOSES OFFENSE; OMISSION OF RECITAL OF CHASTE CHARACTER OF FEMALE NOT FATAL IN SENTENCE FOR RAPE.

2. The entire record may be looked to in ascertaining the offense for which an accused is sentenced, and an erroneous

Criminal Law.—(Continued.)

recital or statement of the offense by the court in pronouncing sentence, or of the clerk in recording the judgment imposed in the minutes of the proceedings kept by him, will not vitiate the judgment when the record fully discloses the offense for which the accused was indicted, tried and convicted. *Hambrick v. State*, 672.

EVIDENCE AS TO DECEASED'S COLOR HELD TO MAKE DEFENDANT'S THREATS TO KILL ONE OF THAT COLOR ADMISSIBLE.

2. Evidence of a physician who examined the body of deceased, stating that his skin was "yellow," with evidence of another witness described as "colored," who was before the jury and who testified that deceased was her father and lived with her, is sufficient proof that the deceased was a negro to render admissible evidence of an alleged threat by plaintiff in error that he was going to "kill me a damn nigger and pay for him." *Guyton v. State*, 621.

EVIDENCE REFERRING TO LANDMARKS AT OR NEAR SCENE OF CRIME IN COUNTY ALLEGED SUFFICIENTLY PROVED VENUE.

1. Where the evidence does not expressly locate the crime as having been committed in the county charged in the indictment, but there are in the evidence references to various localities and landmarks at or near the scene of the crime, known by or probably familiar to the jury, and from which they may have reasonably concluded that the offense was committed in the county alleged, it is sufficient proof of venue. *Lowman et al. v. State*, 18.

EXCLUSION OF FURTHER EVIDENCE FOR DEFENSE BEFORE ARGUMENT HELD ERROR.

4. In a criminal prosecution where the parties have announced that there is no more evidence to be introduced upon either side, it is reversible error for the court to prohibit the defendant from offering additional evidence material to his defense when this offer is made in good faith, and there is no evidence of dilatoriness or negligence on the part of the de-

Criminal Law.—(Continued.)

fense in not offering it earlier, and the arguments of counsel have not been made, and the cause not submitted to the jury under the court's charge. *Steffanos v. State*, 309.

EXEMPTION OF WITNESSES FROM RULE EXCLUDING ALL WITNESSES HELD WITHIN DISCRETION OF TRIAL COURT.

1. The matter of exempting or refusing to exempt a witness from the operation of a rule excluding all witnesses from presence in the court room during the trial, until they are individually called to testify, is largely within the discretion of the trial court, and is not cause for reversal, unless the discretion is flagrantly abused, to the patent prejudice of the party complaining of the ruling. *Robinson v. State*, 736.

FAILURE TO CHARGE ON CIRCUMSTANTIAL EVIDENCE WILL NOT CAUSE REVERSAL, IN ABSENCE OF REQUEST.

2. Where there is sufficient evidentiary basis for charges given, and no material errors of law appear therein, a mere failure to charge on circumstantial evidence will not cause a reversal of a judgment of conviction, no charge on that point having been requested. *Ford v. State*, 781.

FAILURE TO NAME CRIME IN SENTENCE MAY BE SUPPLIED BY REST OF RECORD.

1. "When the record in a criminal case shows fully the crime for which the prisoner was indicted and all the proceedings thereon, through trial and verdict up to conviction and sentence, the failure in the sentence to name the crime for which the prisoner is sentenced may be supplied by reference to the rest of the record." *Hambrick v. State*, 672.

INTENT TO BE SUBMITTED TO THE JURY WITHOUT INTIMATION BY COURT AS TO EFFECT OF PRESUMPTIONS.

4. Upon a charge of larceny where there is conflict in the evidence as to the intent with which the property was taken,

Criminal Law.—(Continued.)

or it is of such a character as to legitimately authorize an inference of a felonious purpose, then the matter should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony. *Curington v. State*, 494.

JUDGMENT AFFIRMED, WHERE EVIDENCE SUFFICIENT AND ERRORS OF PROCEDURE HARMLESS.

3. Where the evidence is legally sufficient to sustain the verdict, and errors of procedure, if any, are harmless, the judgment will be affirmed. *Ford v. State*, 781.

JUDGMENT WILL NOT BE REVERSED UNLESS VERDICT IS CLEARLY WRONG; ERRORS NOT INJURIOUSLY AFFECTING SUBSTANTIAL RIGHTS ARE NOT CAUSE FOR REVERSAL.

2. The judgment should not be reversed or a new trial granted in any case, civil or criminal, for errors in rulings upon the admission or rejection of evidence, or for errors in giving or refusing charges, or for errors in any other matter of procedure or practice, unless it shall appear to the court from a consideration of the entire cause that such errors injuriously affect the substantial rights of the complaining party. Nor should a judgment be reversed or a new trial granted on the ground that the verdict is not sustained by the evidence, unless it appears that there was no substantial evidence to support the finding, or that upon the whole evidence the verdict is clearly wrong, or that the jury were not governed by the evidence in making their finding. *Johnson v. State*, 61.

NON-EXPERT MAY DESCRIBE WOUNDS AND TESTIFY THAT "TWO BIG WOUNDS" IN BREAST WERE SUFFICIENT TO CAUSE DEATH.

1. It is not error to permit a non-expert witness to testify as to the nature of pistol shot wounds in the body of a person recently deceased and to state that the wounds, being "two big wounds" in the breast, were sufficient to cause the death of the person. *Johnson v. State*, 61.

Criminal Law.—(Continued.)

NO OBJECTIONS THAT ARGUMENT OF COUNSEL IS ILLOGICAL.

4. It is not reversible error for the trial court to overrule objections to argument of counsel to the jury because such argument is unsound or illogical. *Brown et al. v. State*, 741.

PRESENTATION OF ASSIGNMENT OF ERROR ON APPLICATION TO AUTHENTICATE BILL MADE UP UNDER COURT RULES HELD NOT NECESSARY.

2. Where a bill of exceptions is made up under Rule 103, no assignment of errors is required to be presented to the judge when application is made to him to authenticate the bill. *Norwood v. State*, 613.

REFUSAL OF INSTRUCTION COVERED BY THOSE GIVEN IS NOT ERROR.

2. No error can be predicated upon the refusal to give a requested instruction that is substantially given in the general charge. *Witt et al. v. State*, 38.

REFUSAL OF NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE NOT REVERSED UNLESS VERDICT CLEARLY WRONG.

2. "The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict, or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust." *Brooke v. State*, 81.

REFUSAL TO GRANT NEW TRIAL NOT DISTURBED, WHERE VERDICT SUPPORTED BY EVIDENCE.

1. Where there is some substantial competent evidence of all the facts legally essential to support the verdict and there is nothing in the record to indicate that the jury was not governed by the evidence a refusal of the trial court to grant a

Criminal Law.—(Continued.)

new trial on the ground of the insufficiency of the evidence to support the verdict will not be disturbed by an appellate court. *Boykin v. State*, 200.

REMARK BY COURT TO WITNESS HELD ERRONEOUS, AS EXPRESSLY QUESTIONING HIS CREDIBILITY.

3. At the beginning of the examination of a witness for the defendant, the trial court *sua sponte* remarked to such witness: "Let me warn you, Mr. Burke, that you answer just such questions as you are asked and no more." This was error, since it tended to be an express questioning by the court of the credibility of the witness. *Robinson v. State*, 736.

STATE'S COUNSEL SHOULD NOT COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.

5. In a criminal prosecution counsel for the State should make no comment upon the defendant's failure to testify when such is the case. *Steffanos v. State*, 309.

SUPREME COURT CANNOT REVIEW JUDGMENT OF CRIMINAL COURT OF RECORD IN MISDEMEANOR PROSECUTION.

3. The conviction in this case being in a Criminal Court of Record and for a misdemeanor, the Supreme Court has no jurisdiction to review the judgment on writ of error, therefore the writ of error taken herein is dismissed. *Licata v. State*, 554.

SUPREME COURT HAS NO APPELLATE JURISDICTION OF MISDEMEANOR CASES IN CRIMINAL COURTS OF RECORD.

1. The Supreme Court has no appellate jurisdiction in cases of conviction of misdemeanor in the Criminal Courts of Record. *Licata v. State*, 554.

Criminal Law.—(Continued.)**TEMPORARY, VOLUNTARY ABSENCE OF DEFENDANT FROM COURT DURING THE TRIAL HELD NO GROUND FOR REVERSAL.**

4. In the trial for a capital offense if an adult defendant unobserved by the court or its officers voluntarily goes into a room adjoining the court room for purposes of his own and remains for a very few moments while a witness for the State is being examined, or while a proposed juror is being examined on his *voir dire*, the defendant being represented by counsel, such temporary and voluntary absence from the court room during the progress of the trial is not a violation of the defendant's organic or statutory rights, and will not cause a reversal of a judgment of conviction that is amply supported by competent evidence, and it does not appear that the defendant could have been harmed or prejudiced by his voluntary absence for such a brief time during the trial. *Lowman et al. v. State*, 18.

TO SUPPORT INDICTMENT CHARGING SECOND OFFENSE, STATE MUST PRODUCE RECORD OF PRIOR JUDGMENT OF CONVICTION.

4. To support an indictment charging the defendant with the manufacture of alcoholic and intoxicating liquors as a second offense of a like character, it is necessary for the State in proof of the latter allegation to produce the record of the prior judgment of conviction. *Norwood v. State*, 613.

VENUE NEED NOT BE ESTABLISHED BEYOND A REASONABLE DOUBT.

2. Venue need not be established beyond a reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be sufficient. *Lowman et al. v. State*, 18.

Criminal Law.—(Continued.)**VERDICT BASED ON SUBSTANTIAL COMPETENT EVIDENCE NOT DISTURBED.**

1. Where there is substantial competent evidence of all the facts legally essential to support the verdict, and there is nothing in the record to indicate that the jury were influenced by considerations outside the evidence, this court will not disturb the verdict. *Brooke v. State*, 81.

VERDICT MUST BE RESPONSIVE TO CHARGE, AND FIND EVERYTHING NECESSARY TO RENDITION OF JUDGMENT.

8. A verdict must be responsive to the charge and find everything that is necessary to enable the court to render judgment. *Stedman v. State*, 547.

VERDICT UNDER INDICTMENT FOR WITHHOLDING MEANS OF SUPPORT FROM WIFE AND CHILD HELD NOT RESPONSIVE.

9. Under an indictment for "withholding the means of support" from wife and child by a husband and father, a verdict of "guilty of non-support of the child" is insufficient as not responsive to the indictment. *Stedman v. State*, 547.

WHERE RECORD SHOWS WANT OF APPELLATE JURISDICTION, WRIT OF ERROR WILL BE DISMISSED SUA SPONTE.

2. Where the record shows a want of appellate jurisdiction in this court, the writ of error will be dismissed *sua sponte*. *Licata v. State*, 554.

DAMAGES.**PRINCIPAL OF REMITTITUR IS THAT COURT CONSIDERS DAMAGES RETURNED EXCESSIVE.**

3. The principle upon which a remittitur is directed to be entered is: the court considers the damages as returned by the jury to be excessive. *Standard Growers' Exchange v. Martin*, 864.

DEEDS.**DELIVERY ESSENTIAL.**

4. Delivery of a deed is essential to the passing of the title to the property intended to be conveyed to the grantee. *Pratt et al. v. Carns et al.*, 243.

GIVING DEED TO THIRD PERSON FOR FUTURE DELIVERY CONSTITUTES DELIVERY WHEN NO CONTROL RETAINED.

5. The placing of a deed in the hands of a third person for future delivery to the grantee may constitute a delivery, but to accomplish this purpose it must be made to appear that in placing the deed in the hands of such third person the grantor intended to, and, in fact, did relinquish and surrender all dominion and control over such deed. *Pratt et al. v. Carns et al.*, 243.

"UNDUE INFLUENCE" DEFINED.

2. The term "undue influence" is not regarded as being susceptible of precise definition, but in order to render a deed void the undue influence relied upon must be of such a character as to overcome the will, deprive the grantor of free agency, and substitute the will of another for that of the grantor. *Pratt et al. v. Carns et al.*, 243.

DIVORCE.**CHANCELLOR'S FINDINGS REVIEWABLE; EVIDENCE INSUFFICIENT TO SUPPORT DECREE ON GROUND OF ADULTERY AND CRUELTY.**

Where the material testimony adduced in a suit for divorce on statutory grounds is uncontradicted and wholly fails to support the allegations of the bill, the decree of the chancellor granting a divorce will be reversed. *Ingraham v. Ingraham*, 75.

Divorce.—(Continued.)**DECREE ERRONEOUSLY FINDING ADULTERY AFFIRMED,
WHERE THERE WAS A SUPPORTABLE FINDING OF
CRUELTY.**

In a proceeding for divorce where counter averments are made in the answer charging the complainant with extreme cruelty and adultery, the testimony examined and found sufficient to support the chancellor's decree, but not upon the ground recited in such decree. *Merchant v. Merchant*, 723.

DRAINS.**ASSESSMENT DIRECTLY MADE BY LEGISLATURE IN
EVERGLADES DRAINAGE DISTRICT HELD NOT DE-
VOID OF REASONABLE BASIS OR AN ABUSE OF
POWER.**

5. There are no allegations in the bill of complaint which would warrant the court in granting the relief prayed. It appears from the allegations of the bill that there are four and a half million acres of land in this drainage district, and that five acres of same belonging to appellant was hammock or upland, and would receive no benefit whatever from the proposed work of drainage and other improvements provided for in and by said Act. We cannot conclude from the allegations that the assessment made by the Legislature, directly, is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power. *Bannerman v. Catts et al.*, 170.

**BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE
DISTRICT IS A GOVERNMENTAL AGENCY; LEGISLA-
TURE MIGHT VALIDATE UNAUTHORIZED CHARGE OF
TOLLS BY SUCH BOARD.**

9. The Board of Commissioners of Everglades Drainage District is a public quasi-corporation, and as such a governmental agency of the State for certain definite purposes, having such authority only as is delegated to it by law. It, therefore, had no power to charge toll for the passage of boats through its locks until authorized to make such charge by Chapter 7865, Acts of 1919, but having assumed to make

Drains.—(Continued.)

such charge and having collected tolls prior to said act, it was competent for the State to ratify and validate such unauthorized charge and collection of tolls, notwithstanding a suit was then pending against said board to recover tolls so paid. *Board of Commissioners Everglades Drainage District v. Forbes Pioneer Boat Line*, 252.

LAWS CREATING EVERGLADES DRAINAGE DISTRICT DO NOT CONFLICT WITH CONSTITUTIONAL PROVISIONS RELATING TO GENERAL TAXATION.

3. The provisions of Chapter 6456, Acts of 1913, Laws of Florida, as amended by Chapter 7862 of the Acts of 1919, Laws of Florida, are not in conflict with Sections 1, 2, 3 and 5 of Article IX of the Constitution. The assessment made under the Acts herein involved is a special assessment for local benefits, and does not come within the Sections 1, 2, 3 and 5 of Article IX of the Constitution. See also *Lainhart v. Catts, supra. Bannerman v. Catts et al.*, 170.

LAWS PROVIDING FOR DRAINAGE AND RECLAMATION OF SWAMP AND OVERFLOWED LANDS ARE A PROPER EXERCISE OF THE LEGISLATIVE AUTHORITY.

1. Chapter 6456 of the Acts of 1913, Laws of Florida, as amended by Section 1 of Chapter 7862 of the Acts of 1919, Laws of Florida, provides for the establishment of the "Everglades Drainage District," for the purpose of protecting the land embraced therein from the effects of water, for agricultural and sanitary purposes, for the public convenience and welfare, and the public utility and benefit. It is well settled that the drainage and reclamation of swamp and overflowed lands are a proper exercise of legislative authority. *Bannerman v. Catts et al.*, 170.

LEGISLATURE ESTABLISHING EVERGLADES DRAINAGE DISTRICT NEED NOT REQUIRE HEARING OF OWNERS PRIOR TO ENACTMENT OF LAW.

6. Where the Legislature enacts a drainage law, like the one herein involved, it is not necessary for the lawmaking body to embrace in the Act a provision for any notice of hear-

Drains.—(Continued.)

ing by the owners of the land in said drainage district prior to the enactment of the law. The Legislature is presumed to have performed its duty correctly and to have made an investigation for itself and determined for itself, before the passage of the Act, what lands should be embraced within the drainage district, and what assessment should be made, and what benefits would be received by the owners of the land. Where the district is created by the Legislature and the assessment made by that body, and all things done directly by the Legislature, as was done in this case, the Legislative will is supreme, and there can be no question of failure to give notice. *Bannerman v. Catts et al.*, 170.

LEGISLATURE MAY DIRECTLY ESTABLISH DRAINAGE DISTRICT AND FIX BOUNDARIES AND DIVIDE INTO ZONES AND DETERMINE ASSESSMENTS.

4. It being within the legislative power to establish, directly, a drainage district for legitimate public purposes, (*Lainhart v. Catts, supra*), it is also within the power of the Legislature to determine the amount of the benefits to be derived, and the necessity and advisability of the local assessment, and when this is done, it is conclusive, and not subject to review by the courts, unless it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power; the Legislature may also fix the amount of taxation, define the boundaries of the district; reduce or raise the drainage tax assessed against the lands in the district, and may also divide the district into zones and provide for the amount to be levied in each zone, as well as determine the benefits to be derived by the lands in the different zones by the improvements proposed. *Bannerman v. Catts et al.*, 170.

EQUITY.

See Appeal and Error.

ANSWER NOT SIGNED BY DEFENDANTS MAY BE TREATED AS NULLITY.

1. Although the oath of defendants to the answer is expressly waived in the bill, defendants are not excused from sign-

Equity.—(*Continued.*)

ing the answer, without which it is not their answer, and in such case where the answer is signed only by the solicitor for defendants, it may be treated as no answer and a decree *pro confesso* entered. *Strickland et al. v. Jewell*, 221.

CORPORATION DEFENDANT IS NOT IN DEFAULT BECAUSE IT APPEARS BY ITS NEW NAME.

8. Where a party is sued as a corporation it is not in default because it appears by its name without describing itself as a corporation. *Stewart v. Preston, et al.*, 473.

DECREE PRO CONFESSO UNAUTHORIZED, WHEN CAUSE AT ISSUE ON BILL AND ANSWER.

6. When a cause is at issue upon bill and answer a decree pro confesso and subsequent proceedings ignoring the answer, taken without notice to defendants, are unauthorized. *Morrill et al. v. Burg et al.*, 606.

DEFENDANT MAY INTERPOSE NEW DEMURRER TO AMENDED BILL.

2. To an amended bill the defendant has a right to interpose a new demurrer, notwithstanding a previous demurrer to the bill has been overruled. *Haimovitz v. Hawk, Sr., et al.*, 272.

DEMURRER TO BILL SHOULD NOT BE SUSTAINED WHERE RIGHTS TO SUBSTANTIAL RELIEF MAY BE SHOWN BY APPROPRIATE EVIDENCE.

Where under the allegations of a bill of complaint an equity for substantial relief may be shown by appropriate and sufficient evidence, it is error to sustain a general demurrer to the bill. *Wells et al. v. Williams et al.*, 498.

MATTERS NOT WHOLLY IMMATERIAL NOT EXPUNGED FOR IMPERTINENCE.

1. Matters not wholly irrelevant and immaterial should not be expunged from an answer in chancery either upon motion or upon exception for impertinence. *Stokely et al. v. Conner et al.*, 89.

Equity.—(Continued.)**MAY BE AMENDED TO CORRESPOND WITH NAMES BY WHICH PARTIES SUING IN WRONG NAME APPEAR.**

6. When a person is sued by a wrong name and appears by his right name, it is proper to amend the pleadings to correspond with the name by which he appears. *Stewart v. Preston et al.*, 473.

NO JURISDICTION WHERE BILL DISCLOSES ADEQUATE LEGAL REMEDY.

3. Where it appears from the allegations of a bill that there is an adequate remedy at law, there is no jurisdiction in a court of equity to hear and determine the matter in controversy. *Smith v. Powell et al.*, 166.

NOTICE OF MOTION TO STRIKE ANSWER IN CHANCERY WAIVED BY APPEARING AND BY FAILURE TO OBJECT.

1. The five days' notice of a motion to strike certain parts of an answer in chancery, seemed to be insufficient, as provided under Chapter 6907, Laws of 1917, may be waived by the party the sufficiency of whose answer is being thus tested by appearing and arguing upon the merits of the motion and by failure to make objection as to the sufficiency of notice at the proper time. *Hanley v. Bullard et al.*, 578.

ONE SUED BY WRONG NAME MAY APPEAR BY CORRECT NAME.

4. Where a person is sued by his wrong name he may appear and defend the action by his correct name. *Stewart v. Preston et al.*, 473.

PARTY SUED BY WRONG NAME MAY WAIVE HIS RIGHT TO PLEAD IN ABATEMENT.

9. Where a party sued by a wrong name wishes to appear and defend on the merits, he may waive his right to plead in abatement, and by appropriate averments, showing that he is the identical party sued, appear and plead to the merits by his true name. *Stewart v. Preston et al.*, 473.

Equity.—(*Continued.*)

PRO CONFESSO SHOULD NOT BE ENTERED AGAINST PARTY SUED BY WRONG NAME AND APPEARING BY ITS RIGHT NAME.

5. Where a person is sued by a wrong name and he appears and submits himself to the jurisdiction of the court by his true name he is not in default, and a decree *pro confesso* should not be entered against him. *Stewart v. Preston et al.*, 478.

SECOND DEMURRER TO WHOLE BILL NOT ALLOWABLE.

1. After a demurrer to the whole bill is overruled a second demurrer to the whole bill is not allowable. *Haimovitz v. Hawk, Sr., et al.*, 272.

SIGNING OF ANSWER HELD WAIVED BY FILING REPLICATION.

3. Where complainants file replication to an answer in chancery defective in that it is not signed by defendants, whose answer it purports to be, they will be held to have waived the signing of such answer by defendants. *Morrill et al., v. Burg et al.*, 606.

SIGNING OF ANSWER IN CHANCERY MAY BE WAIVED IN SAME MANNER AS VERIFICATION.

2. The signing by defendants of their answer in chancery may be waived by complainants in like manner and to the same effect as the verification of such answer by oath of defendants, whose answer it purports to be, may be waived. *Morrill et al. v. Burg et al.*, 606.

SIGNING OF ANSWER WAIVED BY PROCEEDING AS THOUGH CAUSE WERE AT ISSUE UPON BILL AND ANSWER.

4. Where complainants, after the filing of an answer by defendants, in an application for the appointment of a special master to take testimony in said cause, represent to the court that the cause is at issue upon bill and answer of de-

Equity.—(*Continued.*)

fendants, and such application is granted and a special master appointed, the court reciting in the order appointing such master that the cause is at issue upon bill and answer of defendants, complainants will not thereafter be permitted to disregard such answer because unsigned by defendants, and, without giving notice to defendants, take decree *pro confesso* against them and proceed in said cause to final decree, but will be held to have waived the signing of the answer by defendants. *Morrill et al. v. Burg et al.*, 606.

TEST OF LEGAL SUFFICIENCY OF BILL IS BY DEMURRER.

3. The orderly procedure for testing the legal sufficiency of a bill, whether before or after amendment, is by demurrer, and in this way only can the question be saved for review on appeal. *Haimovitz v. Hawk, Sr., et al.*, 272.

TO SET ASIDE DECREE PRO CONFESSO, DEFENDANTS MUST SHOW REASONABLE DILIGENCE AND MERITORIOUS DEFENSE.

2. Before a decree *pro confesso*, which has been properly entered, should be set aside on motion of defendants, they must not only show reasonable diligence, but also a meritorious defense. *Strickland et al. v. Jewell*, 221.

UNDER STATUTE NO REPLY NECESSARY WHERE NO SET-OFF OR COUNTERCLAIM INTERPOSED.

5. Under the provisions of Chapter 6907, Acts of 1915, unless the answer of defendants "asserts a set-off or counter-claim no reply should be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the complainant." *Morrill et al. v. Burg et al.*, 606.

UNSIGNED ANSWER IN CHANCERY MAY BE STRICKEN OR IGNORED.

1. An answer in chancery not signed by defendants, whose answer it purports to be, may be stricken from the files on

Equity.—(Continued.)

motion, or it may be ignored and a decree pro confesso entered against such defendants. *Morrill et al v. Burg et al.*, 606.

WHEN ABSTRACT AND GENERAL ALLEGATIONS SUFFICIENT STATED.

6. Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled. *Pratt et al. v. Carns et al.*, 243.

WHERE LEGAL REMEDY ADEQUATE, RESORT TO CHANCERY IMPROPER.

2. In cases where there is a plain and adequate remedy at law, a resort to a court of chancery is unnecessary and improper. *Smith v. Powell et al.*, 166.

ESCROWS.**AFTER DEPOSIT WITH ESCROW HOLDER GRANTOR HAS NO CONTROL OVER DEED.**

2. After the deposit of an instrument with the escrow holder, the grantor has no control over it, unless the grantee defaults in complying with the conditions of the escrow. *Ullendorff v. Graham et al.*, 845.

DEED DEPOSITED TO BE DELIVERED ON PERFORMANCE HELD AN ESCROW.

1. A deed conveying land to a named grantee, and deposited with a third person, to be by him delivered to the grantee upon the performance by the grantee of stated conditions of purchase, is an escrow. *Ullendorff v. Graham et al.*, 845.

Escrows.—(Continued.)**ESCROW HOLDER A TRUSTEE OF BOTH PARTIES;
ESCROW AGREEMENT NEED NOT BE IN WRITING.**

3. An escrow holder is in effect a trustee of both parties charged with the performance of an express trust governed by the escrow agreement, which agreement is not required to be in writing, there being a deposit of the escrow paper. *Ullendorff v. Graham et al.*, 845.

**WHERE GRANTEE HAS PERFORMED ALL CONDITIONS,
HE IS ENTITLED TO HAVE ESCROW INSTRUMENT
DELIVERED.**

4. When a grantee named in a deed of conveyance has complied with all the conditions of an escrow agreement, he is entitled to have the escrow instrument delivered to him; and upon refusal of the escrow holder to so deliver he may be compelled to do so. *Ullendorff v. Graham et al.*, 845.

EVIDENCE.

See Courts.

**EVIDENCE SHOULD PRODUCE REASONABLE BELIEF IN
FACTS ESSENTIAL TO VERDICT; CHARGES SHOULD
CONFORM TO EVIDENCE.**

1. Charges given to the jury should conform to the evidence adduced in the case and the evidence should not only preponderate in favor of the verdict, but the evidence should produce in the minds of the jury a reasonable belief of the facts essential to the verdict. *S. A. L. Ry. Co. v. Royal Palm Soap Co.*, 800.

**JUDICIAL NOTICE THAT CATTLE RAISING IS IMPORTANT
INDUSTRY IN FLORIDA.**

1. The court takes judicial notice that cattle raising is an important industry in this State. *Whitaker v. Parsons*, 352.

Evidence.—(*Continued.*)

MAKER CANNOT CONTRADICT HIS WRITTEN CONTRACT BY SHOWING PAROL CONTEMPORANEOUS AGREEMENT OF NON-LIABILITY.

5. The maker of a promissory note for which there was a consideration will not be permitted to vary or contradict his written contract by showing a parol contemporaneous agreement that he was not to be liable upon the note. *Strickland et al. v. Jewell*, 221.

PLEA DENYING RELATION IN WHICH DEFENDANTS ARE SUED PUTS BURDEN OF PROOF ON PLAINTIFF.

1. A plea denying the existence of the relation in which defendants are sued imposes upon the plaintiff the burden of proving the existence of the relation as alleged. *Mach v. Mayo*, 372.

WITNESS MAY TESTIFY TO FACTS, BUT NOT AS TO HIS OPINION AS TO EXISTENCE OF PARTNERSHIP RELATION.

3. It is competent for a witness to testify as to the facts which it is claimed constitute the partnership relation between certain persons, but he may not testify as to his opinion concerning the existence of the relation. *Mach v. Mayo*, 372.

EXECUTION.

LIEN BINDS ALL PROPERTY SUBJECT TO LEVY.

6. As a general rule the lien of an execution operates upon and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate. *Evins v. The Gainesville Natl. Bank et al.*, 84.

MORTGAGE ON REALTY, NOT BEING SUBJECT TO LEVY, NOT SUBJECT TO LIEN.

7. An execution is a lien only upon such property as the writ may be levied upon; and under the statute only "lands and tenements, goods and chattels, equities of redemption in real

Execution.—(Continued.)

and personal property and stock in corporations" are subject to levy and sale under executions, therefore, a mortgage upon real estate, being merely a contract lien upon the land, is not subject to levy and consequently not subject to the lien of an execution. *Evins v. The Gainesville Natl. Bank et al.*, 84.

PROPERTY SUBJECT TO LEVY AND SALE ENUMERATED.

2. Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations are subject to levy and sale under execution. *Evins v. The Gainesville Natl. Bank et al.*, 84.

WRIT OF FIERI FACIAS A LIEN FROM DELIVERY TO SHERIFF.

1. An execution issued on a judgment, called a writ of *fieri facias*, is a lien upon the personal property of the defendant in execution from the time such writ shall be delivered to the sheriff. *Evins v. The Gainesville Natl. Bank et al.*, 84.

FALSE PRETENSES.**STATUTE PUNISHING ISSUANCE OF CHECKS AGAINST INSUFFICIENT FUNDS HELD NOT CLEARLY INVALID.**

3. Even if it should be held that the rule obtains in this State which permits the question of the constitutionality of a statute upon which a criminal prosecution is based to be raised for the first time in the appellate court, it is not so clearly made to appear that the statute which is the basis of the prosecution in this case is in contravention of any designated provision of the Constitution as to warrant a holding that the statute is invalid. *McQuagge v. State*, 768.

FISH.**NUMBER OF LICENSE FEES NECESSARY UNDER STATUTE STATED.**

2. One who pays the license provided for in Section 14 of the Act mentioned in the first head-note is not required to pay a

Fish.—(Continued.)

further tax of ten dollars upon aliens or non-residents engaged in the fishing industry required by the succeeding paragraph of the same section. *McClain v. West*, 732.

STATUTE CONSTRUED AS TO LICENSE BY ALIEN OR NON-RESIDENT EMPLOYED ON FISHING BOATS.

3. An alien or non-resident employed upon a boat engaged in the fishing industry is required to pay the license whether he actually fishes or not, and if he is upon a boat not engaged in the fishing industry, but fishes for purposes other than his own use, he is required to pay the license of ten dollars—but one person is not required to pay both licenses. *McClain v. West*, 732.

STATUTE IMPOSING LICENSE TAX ON ALIENS OR NON-RESIDENTS FOR FISHING CONSTRUED.

1. Chapter 6877, Laws of 1915, Section 14, imposes a license tax of ten dollars upon aliens or non-residents engaged in taking fish from the salt waters of the State, whether by hook, line, rod or reel, for purposes other than his own individual use, while operating in whole or in part a boat engaged in the fishing industry. *McClain v. West*, 732.

FRAUD.**ACTUAL FRAUD DEFINED.**

1. The distinguishing element of actual fraud is always untruth between the parties to the transaction. *Douglas et al. v. Ogle*, 42.

"CONSTRUCTIVE FRAUD" DEFINED.

2. Constructive fraud is a term applied to a great variety of transactions which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud and for which it gives the same or similar relief as that granted in cases of actual fraud. *Douglas et al. v. Ogle*, 42.

FRAUDS, STATUTE OF.

MEMORANDUM MUST REFER TO ANOTHER WRITING IN ORDER TO INCORPORATE IT; PAROL EVIDENCE CANNOT ESTABLISH CONTRACT.

3. Memorandum, in order to make another writing a part thereof so as to constitute a part of the contract, must refer to such other writing, and parol proof of the connection of the papers is not admissible to establish a contract required by the statute of frauds to be in writing. *Meek v. Briggs et al.*, 487.

PAROL EVIDENCE MAY IDENTIFY CONNECTED WRITING.

4. While memorandum of the contract may consist of two or more writings connected by clear reference in one to the other and parol testimony is inadmissible to connect them, it may in such case be resorted to to identify the writing referred to. *Meek v. Briggs et al.*, 487.

TELEGRAMS OR LETTERS TO AN AGENT MAY CONSTITUTE MEMORANDUM OF CONTRACT TO SELL LAND.

1. Telegrams or letters to the writer's agent may constitute adequate memorandum of the contract under the statute of frauds, and several telegrams, letters or other writings signed by the party to be charged may be considered together in supplying the essential elements of such memorandum as will satisfy the statute. *Meek v. Briggs et al.*, 487.

UNSIGNED WRITINGS MAY SATISFY STATUTE, WHERE REFERRED TO IN THE SIGNED WRITINGS.

2. When memorandum under the statute of frauds consists of more than one writing, some of which are signed by the party to be charged and others not signed by him, in order that the unsigned writing or writings may be used to supply the essential elements of the contract there must be some reference to them in the signed writings of such party. *Meek v. Briggs et al.*, 487.

FRAUDULENT CONVEYANCES.**FRAUDULENT INTENT MAY BE SHOWN BY CIRCUMSTANTIAL EVIDENCE.**

2. In the very nature of the case, fraudulent intent must usually be shown by circumstantial evidence, and circumstances altogether inconclusive if separately considered may, by their number and joint consideration, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Florida Natl. Bank of Gainesville et al. v. Sherouse*, 405.

GUARANTY.**GUARANTOR'S OBLIGATION HELD NOT TO CREATE A CONTINUING GUARANTY TO PAY DRAFTS NOT EXCEEDING A CERTAIN AMOUNT FOR AN INDEFINITE PERIOD.**

5. Defendant agreed with a third party to pay drafts drawn on him through a designated bank and gave to him the following letter evidencing such agreement: "You may inform the Peoples Savings Bank of your city that I will honor your drafts drawn on me, amount not to exceed five hundred dollars, if this will be of service to you." *Held*, that the obligation assumed by defendant was limited to the amount stated in the letter and that the language employed did not create a continuing guarantee by defendant to pay drafts not exceeding this amount from time to time for an indefinite period. *Peoples Savings Bank & Trust Co. v. Landstreet*, 853.

GUARANTY CONTRACT SHOULD BE LIBERALLY CONSTRUED AS TO INTENT, AND STRICTLY AS TO THE WORKING OUT OF THE INTENT.

4. "In considering a contract of guaranty a liberal construction should be indulged to determine the intent of the parties, and when that intent is discovered the guarantor is entitled to a strict construction in the working out of the intent." *Peoples Savings Bank & Trust Co. v. Landstreet*, 853.

HABEAS CORPUS.**FATHER HAS PARAMOUNT RIGHT TO CUSTODY OF CHILDREN AT COMMON LAW.**

1. At common law the father has a paramount right to the custody and control of his legitimate minor children, subject only to lawful regulations for the benefit of his children. *Busbee v. Weeks et al.*, 323.

FATHER HELD ENTITLED TO CUSTODY OF CHILD AS AGAINST MATERNAL GRANDPARENTS.

2. Where an infant girl's mother died at its birth and when the child was three days old its father verbally committed its care and custody to its maternal grand parents until the father could otherwise provide for its proper care, and when the child is about four years old, the father, who, with his other children, live with his parents, is entitled to the custody of the infant girl, particularly when all of the home conditions of the maternal grand parents are not so desirable and the father's home with his parents is a proper place for the child's welfare, even though the personal attentions of the maternal grand parents to the infant girl are in every way commendable. *Busbee v. Weeks et al.*, 323.

HOMESTEAD.**ACTUAL CONTIGUITY OF LANDS NOT REQUIRED BY CONSTITUTION.**

1. The Constitution does not expressly require contiguity of lands for the exemptions of a homestead, and as the meaning of the word "homestead" is not defined in the organic provision on the subject, the question whether actual contiguity is required must be determined in each case on its peculiar facts. *Clark et al. v. Cox et al.*, 63.

CAN BE WAIVED ONLY BY ABANDONMENT OR LEGAL ALIENATION.

3. Where a homestead has been acquired, it can be waived only by abandonment or by alienation in the manner provided by law. *Clark et al. v. Cox et al.*, 63.

Homestead.—(*Continued.*)CONSTITUTIONAL PROVISIONS SHOULD BE LIBERALLY
CONSTRUED, BUT NOT USED TO DEFRAUD.

2. A liberal interpretation should be given to the homestead provisions for the benefit of the family, but the beneficent provisions of the Constitution should not be used as a means to defraud. *Clark et al. v. Cox et al.*, 63.

CONVEYANCE IN FEE OF RAILROAD RIGHT OF WAY HELD
NOT TO DESTROY.

4. Where land owned by the head of a family residing in this State constitutes the homestead, and is so occupied and used, the conveyance in fee of a strip 100 feet wide for the use of a public railroad right-of-way through the land does not destroy the homestead character of the land on both sides of the conveyed strip, where the land on both sides of the strip continued to be actually and exclusively used as parts of the home place for homestead purposes and for the support of the family. *Clark et al. v. Cox et al.*, 63.

EXEMPTION HELD NOT LOST BY TEMPORARY ABSENCE
WITH INTENT TO RETURN.

Where the head of a family residing in this State lives with his family as their home on premises owned by him, and for purposes of business and education, temporarily removes his family to another place, with an intent to return to the home place, and without relinquishing such intent, eventually returns with his family to their home place and occupies it as a homestead before executions are levied on it under judgments obtained during the temporary absence of the family from the home place, the property is exempt from forced sale for the owner's obligations not covered by those mentioned in the homestead Article of the Constitution, the homestead character of the property not being lost by abandonment, the place having been actually occupied as the home, and the circumstances of the absence therefrom being consistent with a continued intent to return to and to occupy and claim the place as the family home. *Read et al. v. Leitner et al.*, 574.

Homestead.—(Continued.)**INTEREST OF WIDOW AND HEIRS DEFINED.**

1. Under Sections 1 and 2 of Article X of the Constitution, if the head of a family residing in this State is the owner of a homestead as defined by the Constitution, at the death of such owner, "the exemptions provided for shall inure to the widow and heirs" if the owner be a married man. The statute prescribes who are to be the "heirs" and what interests or rights in "the exemptions provided for in" the Constitution "shall inure to the widow and heirs of the party entitled to such exemption." *Rawlins v. The Dade Lumber Co.*, 398.

LIENS OF JUDGMENTS OBTAINED AGAINST HUSBAND AFTER HIS CONVEYANCE TO WIFE EXCLUDED IN ABSENCE OF FRAUD.

3. Where the husband who lived on his homestead with his wife, they having no children, leaves his wife on the homestead and lives elsewhere in the same town, the wife remaining on the homestead, and the husband executes a deed of conveyance of the homestead to the wife, such conveyance may be a relinquishment to the wife of the husband's rights in the homestead, there being no children to whom the homestead could "inure" as heirs of the husband, and the homestead may be exempt from the lien of judgments obtained against the husband after the relinquishment by conveyance to the wife. In such a case if the homestead rights have been lost, the conveyance to the wife for a sufficient consideration would give her a title to the exclusion of the liens of judgments obtained against the husband after the conveyance to her, there being no fraud. *Rawlins v. The Dade Lumber Co.*, 398.

MORTGAGE OF HOMESTEAD CANNOT BE ENLARGED BY SUBSTITUTION OF HUSBAND'S NEW NOTE, TO WHICH WIFE WAS NOT A PARTY.

8. The obligation of a mortgage executed by a husband and wife on their homestead can not be enlarged by the mere substitution of a new note for a larger sum representing a further loan to the husband to which the wife was not a party. *Douglas et al. v. Ogle*, 42.

Homestead.—(Continued.)**WHERE THERE ARE NO CHILDREN SURVIVING, WIFE OF OWNER TAKES ENTIRE PROPERTY.**

2. As to real estate other than a homestead, the "*children and their descendants*" of a male parent are his "heirs;" Section 2295, General Statutes of 1906; but as to the homestead real estate, *if there are no children* of the owner of a homestead at his death, and he leaves a wife surviving him, she takes the entire property. *Rawlins v. The Dade Lumber Co.*, 398.

HOMICIDE.**DYING DECLARATIONS ADMISSIBLE ONLY WHERE DECLARANT HAS ABANDONED ALL HOPE OF RECOVERY, BUT EXPRESSED UTTERANCES BY DECLARANT ARE NOT ESSENTIAL.**

1. Evidence of dying declarations is admissible only in cases where the declarant has abandoned all hope of recovery from the injury received at the hands of the accused, and is convinced that his death is inevitable and near at hand. But in passing upon the question of whether the declarant was in such mental state at the time of making the declaration as to render it admissible under the foregoing test, resort may be had to all the circumstances of the case and expressed utterances are not essential. *Richardson v. State*, 634.

EVIDENCE OF KILLING LITTLE GIRL WILL NOT SUPPORT CONVICTION OF KILLING NAMED PERSON; IDENTITY CANNOT BE INFERRED ON APPEAL.

2. The deceased is referred to in the evidence as a "little girl," and while it is probable that the "little girl" referred to as having been killed was the person alleged in the information to have been killed, an appellate court cannot, in the absence of any proof at all to that effect, infer that such was the case. *Smith v. State*, 710.

Homicide.—(*Continued.*)INFORMATION FOR ASSAULT WITH INTENT TO MURDER
HELD TO ALLEGE INTENT SUFFICIENTLY.

An indictment for the offense of assault with intent to commit murder, which alleges that the assault was made "unlawfully and from a premeditated design to affect the death" of the person assaulted, sufficiently alleges the statutory "intent" to commit the felony of murder. *Ormond v. State*, 725.

NAME OF PERSON KILLED IS MATERIAL ALLEGATION
AND MUST BE PROVED.

1. The name of the person alleged to have been killed in an information charging manslaughter is a material and essential allegation that must be proved before a conviction can be sustained upon such information. *Smith v. State*, 710.

PREMEDITATED DESIGN TO EFFECT DEATH ESSENTIAL
ELEMENT OF MURDER IN FIRST DEGREE.

3. Premeditated design to effect death is an essential element of the crime of murder in the first degree, and where the evidence offered is insufficient to establish this element of the crime a judgment upon a verdict finding the defendant guilty of murder in the first degree will be reversed. *Richardson v. State*, 634.

PROOF OF CORPUS DELICTI HELD TO SUSTAIN A CON-
VICTION OF MANSLAUGHTER.

3. A physician who examined the body of deceased testified that his death resulted from a gun shot wound; that the bullet entered the "left chest" of deceased, passing through his body, "penetrating or cutting part of the heart and the lower part of the lung," causing his death. Another witness testified that plaintiff in error admitted that "he (plaintiff in error) took his gun and killed him (deceased.)" *Held*: that this is sufficient proof of the *corpus delicti* to sustain a verdict of guilty of manslaughter. *Guyton v. State*, 621.

Homicide.—(*Continued.*)

THREATS AGAINST CLASS OR RACE TO WHICH DECEASED BELONGED HELD ADMISSIBLE.

1. Evidence of threats by the accused against the class of persons or race to which the deceased belonged are admissible in evidence against the accused upon a trial in which he is charged with the murder of a member of such class or race. *Guyton v. State*, 621.

WHETHER OFFERED DECLARATIONS WERE MADE WITH KNOWLEDGE THAT DEATH WAS IMMINENT IS FOR COURT; PRELIMINARY TEST MAY BE GATHERED FROM CIRCUMSTANCES.

3. To render dying declarations admissible, the judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope of recovery. This absence of all hope of recovery and appreciation by the deceased of his speedy and inevitable death is a preliminary foundation that must always be laid to make such declarations admissible. It is a mixed question of law and fact for the judge to decide before permitting the introduction of the declaration itself. It is not necessary that such preliminary test should consist of express utterances, but it may be gathered from any circumstances or from all the circumstances of the case. *Lowman et al. v. State*, 18.

WHETHER SUFFICIENT PREDICATE HAS BEEN LAID FOR ADMISSION OF DYING DECLARATIONS IS FOR TRIAL COURT; RULING AS TO SUFFICIENCY PRESUMED CORRECT AND NOT DISTURBED UNLESS CLEARLY ERRONEOUS.

2. Whether a sufficient and proper predicate has been laid for the admission in evidence of dying declarations is a primary matter for determination by the trial court, being a mixed question of law and fact, and the judgment of such court thereon is entitled to great weight, every presumption being in favor of its correctness, but such ruling is subject to review by an appellate court, though it will not be disturbed, unless it clearly appear to be erroneous. *Richardson v. State*, 634.

HUSBAND AND WIFE.**CONSTITUTIONAL PROVISION HELD TO ENABLE MARRIED WOMAN TO ASSUME OBLIGATIONS CHARGEABLE AGAINST HER SEPARATE PROPERTY.**

2. Section 2 of Article XI of the Constitution of Florida, which provides, among other things, that a married woman's separate real or personal property may be charged in equity and sold, etc., for "labor and material used with her knowledge or assent in the construction of buildings or repairs or improvements upon the property," etc., removes from the married woman under certain restrictions, the common law disability of coverture, and to enable her to assume obligations that can be charged in equity upon and enforced out of her separate property. *Agin v. Gainesville Planing & Coffin Co.*, 679.

MARRIED WOMAN'S CONTRACT TO CONVEY SHOULD BE ACKNOWLEDGED.

3. A contract for the conveyance of lands when executed by a married woman should be acknowledged by her in accordance with the requirements of the statute provided in such cases. *Richardson v. Varn*, 517.

MARRIED WOMAN MAY INVEST MONEY OR LABOR IN BUSINESS AND ACQUIRE INTEREST, ALTHOUGH NOT AS PARTNER.

2. A married woman by reason of her coverture may not make a valid contract of co-partnership, yet she may invest her money or labor in a mercantile business and acquire an interest therein. *LeNoir v. McDaniel*, 500.

STATUTE AS TO DESERTION AND NON-SUPPORT OF WIFE AND CHILDREN CONSTRUED.

1. The effect of Chapter 6483, Acts of 1913, Laws of Florida, Section 3569, Florida Compiled Laws, 1914, is to make the act of unlawful desertion by a husband and father of his wife and child or children, or by a husband of his wife or by a father of his child or children a crime. The same is true with respect to withholding from them or any one or

Husband and Wife.—(Continued.)

more of them the means of support. If he unlawfully withholds from them or any one or more of them the means of support his act is a crime. The unlawful desertion by him of any one or more of them, or the unlawful withholding by him of the means of support from any one or more of them, renders him amenable to the penalties prescribed by the statute, the only difference being that as to the wife his liability under the statute is contingent upon the non-existence of such cause or causes for his act or acts as may be recognized as ground or grounds for divorce. *Stedman v. State*, 547.

STATUTES PUNISHING ABANDONMENT OR NEGLECT OF HUSBAND TO SUPPORT WIFE MUST BE STRICTLY CONSTRUED.

5. At common law abandonment by or neglect of a husband to support his wife was not a criminal offense. Statutes, therefore, making such acts indictable and punishable as a crime must be strictly construed. *Stedman v. State*, 547.

STATUTES PUNISHING DESERTION AND NON-SUPPORT HELD NOT SUBSTITUTES FOR STATUTES AFFORDING CIVIL REMEDIES.

7. Statutes such as that under consideration are not substitutes for statutes affording civil remedies in such cases. *Stedman v. State*, 547.

● WHEN HUSBAND PERSONALLY LIABLE ON WIFE'S NOTE, STATED.

4. Where a husband signs a promissory note with his wife to aid her in obtaining a loan of money and also unites with her in the execution of a mortgage on her real property to secure the payment of the note the husband is personally liable on the note even though the wife is not so liable. *Strickland et al. v. Jewell*, 221.

Husband and Wife.—(*Continued.*)**"WITHHOLDING MEANS OF SUPPORT" PRESUPPOSES
ABILITY TO SUPPORT, AND NEED THEREOF.**

6. Withholding the means of support means something more than failure to support or non-support. It presupposes the existence or the ability to obtain the means of support by the accused and need by the alleged dependent or dependents from whom support is withheld. That which has no existence, actual or potential, cannot be withheld; neither can that be withheld which is already possessed. *Stedman v. State*, 547.

INDICTMENT AND INFORMATION.

See Burglary.

**ACTION ON DEFENDANT'S MOTION FOR BILL OF PAR-
TICULARS IS LARGELY DISCRETIONARY.**

1. The granting or overruling of a motion for a bill of particulars made by defendant in a criminal case rests largely in the discretion of the trial court. *Brown et al. v. State*, 741.

**ALLEGING BURGLARY SUBSTANTIALLY AS DEFINED BY
STATUTE SUFFICIENT.**

1. Whatever may be the rule for alleging the common law crime of burglary, an information alleging the offense substantially as defined by the statute, is sufficient where the nature and cause of the accusation as made could not reasonably mislead or embarrass the accused in concerting his defense. *Habersham v. State*, 240.

**ALL THE COUNTS CONSTITUTE THE "INDICTMENT;"
FORMAL CONCLUSION AT END OF LAST COUNT AP-
PLIES TO ALL.**

3. No single count in an indictment containing more than one is the indictment. The indictment is the thing which contains all the counts, and where it concludes with the words "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of

Indictment and Information.—(*Continued.*)

Florida" the conclusion belongs to the entire indictment and applies to each count. *Lasher v. State*, 712.

CHARGE OF ASSAULT WITH INTENT TO MURDER IN FIRST DEGREE WILL SUSTAIN VERDICT FOR SECOND DEGREE.

2. A verdict of guilty of assault with intent to commit murder in the second degree upon a charge of assault with intent to commit murder in the first degree will be sustained if the evidence shows an assault with intent to commit murder in the first degree or in the second degree as defined in the statute, since the latter offense is regarded as being included in the former. *Boykin v. State*, 200.

DESERTION OF WIFE AND WITHHOLDING OF SUPPORT FROM WIFE AND CHILDREN HELD INDICTABLE AS IN ONE COUNT.

2. While either the unlawful desertion or the unlawful withholding the means of support by a husband from his wife may be a distinct act from the desertion or withholding of the means of support by a father from his child or children, and each or either of such acts may be indictable and punishable as separate offenses under the statute, yet when such desertion or withholding of means of support from the wife and child or children is by the same person at the same time, such conduct may, under the statute, be regarded as constituting one offense. Where this is the case there can be no valid objection to an indictment charging the commission of such offense in a single count only and a verdict on such indictment finding defendant guilty as to less than the whole number named in the indictment will not operate as an acquittal generally of the defendant. *Stedman v. State*, 547.

FORMAL CONCLUSION AT THE END OF LAST COUNT IS SUFFICIENT.

2. Where an information contains more than one count and only the last count concludes with the words "contrary to the form of the statute in such case made and provided and

Indictment and Information.—(*Continued.*)

against the peace and dignity of the State of Florida," such conclusion reaches back to each count, and it is not necessary that each count should so conclude. *Lasher v. State*, 712.

INDICTMENT CHARGING MANUFACTURING OF INTOXICATING LIQUORS HELD NOT BAD BECAUSE IT CONTAINED FACT ALLEGATIONS UNDER STATUTE PROHIBITING SALE.

1. An indictment charging one with the offense of manufacturing alcoholic and intoxicating liquors in a county where the sale of liquors had been prohibited by law, and such offense is alleged to have been committed after the passage of Chapter 7736, Laws of 1918, is not bad because it contains some allegations of fact required by Chapter 7283, Laws of 1917, as to the sale of intoxicating liquors having been prohibited by law in the county where the offense was alleged to have been committed. *Norwood v. State*, 613.

INDICTMENT SHOULD NOT BE QUASHED FOR DEFECTS IN FORM, UNLESS PREJUDICIAL.

2. An information should not be quashed on account of any defects in form unless it is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. *Steffanos v. State*, 309.

INFORMATION FOR STATUTORY RAPE NOT BAD, BECAUSE OMITTING WORD "UNLAWFUL."

1. An information charging a male person with having carnal intercourse with an unmarried female of previous chaste character who at the time of such intercourse was under the age of eighteen years, and such offense is alleged to have been committed at a time subsequent to the passage of Chapter 7732, Laws of Florida, 1918, is not bad because it omits the word "unlawful" just preceding the words "carnal intercourse." *Steffanos v. State*, 309.

Indictment and Information.—(*Continued.*)

ISSUE OF DUPLICITY MUST BE RAISED BY DEMURRER
OR MOTION TO QUASH BEFORE VERDICT RENDERED.

4. It is settled by the great weight of authority that where an information or indictment is complained of on the ground of duplicity the defendant must make the assault thereon by demurrer or by motion to quash before verdict rendered, and that he can not assail it for duplicity by a motion in arrest of judgment. If he delays until after verdict rendered to raise the issue of duplicity in the indictment he will be held to have waived such issue. *Stedman v. State*, 547.

REFUSAL OF BILL OF PARTICULARS TO DEFENDANT IS
NOT ABUSE OF DISCRETION UNLESS BILL IS NEC-
CESSARY.

2. There is no abuse of discretion in denying a motion for a bill of particulars made by defendant in a criminal case in the absence of any showing that a bill of particulars was necessary in the proper administration of justice in such case. *Brown et al. v. State*, 741.

WHEN DISTINCT ACTS INDICTABLE AS DISTINCT CRIMES
MAY BE COUPLED IN ONE COUNT AS ONE OFFENSE
STATED.

3. When a statute makes either of two or more distinct acts, connected with the same general offense, and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offense. *Stedman v. State*, 547.

INJUNCTION.

LEGAL REMEDY FOR TRESPASS BY SCATTERING RANGE
CATTLE INADEQUATE.

2. A herd of cattle upon the range the ownership of which is protected in some measure by recorded marks and brands under the law constitutes property of such peculiar character, that a clear remedy does not exist at law for a tres-

Injunction.—(Continued.)

pass, which results in scattering many units of the herd over the county to be possessed by other owners of cattle in herds upon common ranges and a practical division of the mark and brand of the owner. *Bass v. Alderman*, 345.

NOT GRANTED WHEN LEGAL REMEDY ADEQUATE.

1. An injunction should not be granted when the remedy at law is adequate. *Smith v. Powell et al.*, 166.

INSURANCE.**FAILURE TO PROMPTLY GIVE NOTICE AND MAKE PROOF OF LOSS HELD NOT TO INVALIDATE POLICY.**

1. The provisions in a standard fire insurance policy requiring the insured to notify the company in writing of the loss and to furnish proof of such loss are conditions precedent to the right to sue, but the failure to comply with said provisions promptly does not invalidate the policy or work a forfeiture of the rights of the insured in the absence of a stipulation to that effect. *Natl. Union Fire Ins. Co. v. Cone*, 265.

INTEREST DOES NOT RUN PRIOR TO TIME INSURANCE PAYABLE.

6. Where a fire insurance policy provides that loss shall not be payable until sixty days after the proof of loss has been furnished, interest on the amount due does not run prior to said time. *Natl. Union Fire Ins. Co. v. Cone*, 265.

POLICY HELD NOT INADMISSIBLE FOR VARIANCE BETWEEN IT AND COPY ATTACHED.

2. An objection to the introduction in evidence of the original fire insurance policy sued on because of variance between the names of the persons signing as president and secretary as shown by said original policy and the copy attached to the declaration was properly overruled when the court was unable to distinguish from the signatures whether they were the same or not and when the company's agent who issued the policy and whose name was properly given in the copy,

Insurance.—(*Continued.*)

identified the policy as the one signed by him and delivered to the plaintiff covering the property in question. *Natl. Union Fire Ins. Co. v. Cone*, 265.

INTERPLEADER.

COMPLAINANT CANNOT ADJUST HIS OWN CLAIMS AND ASK INTERPLEADER AS TO REMAINDER.

6. A complainant in interpleader cannot adjust his own claims against the matter in controversy, and ask the defendants to interplead as to the remainder. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

COMPLAINANT MUST HAVE NO INTEREST IN LITIGATION; BILL OF "INTERPLEADER" DEFINED.

1. One of the essential elements to entitle a person by bill of interpleader to be discharged from obligation to persons claiming any part of a fund in his hands who is doubtful as to whom it should be paid, is that he has no interest in the litigation, and only seeks to be relieved of the danger of being molested by the conflicting rights of others among themselves. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

IF AMOUNT IS RESULT OF COMPLAINANT'S ADJUSTMENT OF DEDUCTIONS, DEFENDANT MAY SO ALLEGE AND AMOUNT MAY BE INQUIRED INTO.

7. If the amount brought into court is not the difference between the payments and the contract price, but the result of complainant's own adjustment of deductions he thinks should be made, the defendants are entitled to show that in their answers, and while the amount is not an issue to be settled by decree in a strict interpleader, it may be inquired into to ascertain whether complainant can maintain the suit. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

NOT ALLOWED IF COMPLAINANT HAS INTEREST OTHER THAN TO HAVE FUND PROPERLY APPLIED.

5. If the complainant in a bill of interpleader has an interest in the litigation other than to have the fund properly ap-

Interpleader.—(Continued.)

plied or paid to the proper party, the interpleader will not be allowed. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

NOT MAINTAINABLE WHERE DEFENDANT CONTESTS AND LITIGATES CLAIM SET UP BY PLAINTIFF.

3. There can be no bill of interpleader, or bill in the nature of a bill of interpleader, when the defendants contest and litigate with the plaintiff himself as to the validity and allowance of a claim set up by himself. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

PLAINTIFF PUT TO PROOF WHEN ESSENTIAL FACTS DENIED.

4. When the answer denies the facts upon which the bill depends as a bill of interpleader, the plaintiff is put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

WHERE ALLEGATION OF AMOUNT IN COMPLAINANT'S HANDS IS DENIED, HE SHOULD BE PUT TO PROOF; BILL DISMISSED ON FINDING THAT COMPLAINANT HAS MORE IN HIS HANDS THAN ALLEGED.

2. If the answer to a bill of interpleader denies the allegation in the bill of the amount the complainant alleges that he has in his hands which he is ready to turn over to the court to be litigated among the defendants, the complainant should be put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead, and if the court finds that the complainant has in his hands a sum in excess of the amount which he offers to pay into court, he should be denied the relief prayed and the bill dismissed. *Lowry et al. v. Downing Mfg. Co. et al.*, 745.

INTOXICATING LIQUORS.

CHARGE OF MANUFACTURE HELD NOT SUPPORTED BY EVIDENCE BY POSSESSION OF LIQUOR NOT PROVEN ALCOHOLIC NOR INTOXICATING.

3. A charge in an indictment that the defendant manufactured alcoholic and intoxicating liquors is not supported by evidence that the defendant had in his possession four gallons of "buck," without any evidence that the liquid was either alcoholic or intoxicating. *Norwood v. State*, 613.

CONSTITUTION HELD NOT TO FORBID STATUTE TAKING EFFECT ON SAME DAY CONSTITUTIONAL PROVISION, AS AMENDED, BECAME EFFECTIVE.

7. Original Article XIX of the State Constitution was superseded January 1st, 1919, by amended Article XIX, which had been adopted by the electors of the State at the General Election held November 5, 1918, to "go into effect on the first day of January, A. D. 1919;" and Original Article XIX did not forbid the enactment of the statute designated as Chapter 7736, entitled An Act to make effective the Nineteenth Article of the Constitution of this State, as amended at the General Election held November 5th, nineteen hundred and eighteen," etc., enacted at the Special Session held in November and December of 1918, and approved December 7, 1918, which statute by virtue of Section 18 of Article III of the State Constitution "specifically provided in such law," that it should "go into effect on the first day of January, A. D. 1919," the day amended Article XIX became effective as organic law. *Neisel v. Morgan*, 98.

JUDGMENT.

F

JUDGMENT AGAINST MAKER AND INDORSER OF NOTE NOT SUBJECT TO COLLATERAL ATTACK FOR MISJOINDER OF PARTIES.

- A judgment against the maker and an endorser of a note obtained in a county where one of them resides, after service of process as provided by law, is not void and subject to collateral attack. *Forest Investment Co. et al. v. Aultman*, 790.

Judgment.—(Continued.)**WHEN ALIENEE, ETC., NOT BOUND BY SUBSEQUENT JUDGMENT.**

2. No alienee, grantee, assignee, or mortgagee is bound or affected by a judgment or decree in a suit commenced by or against the alienor, grantor, assignor or mortgagor subsequent to the alienation, grant, assignment or mortgage to which he is not a party. *Stokely et al. v. Conner et al.*, 89.

JURY.**VERDICT DIRECTED WHEN EVIDENCE LEGALLY INSUFFICIENT VIOLATES RIGHT TO JURY TRIAL.**

2. A verdict for one party may be directed only when the evidence adduced is legally insufficient to support a judgment for the opposing party, otherwise the organic "right of trial by jury" would be violated. *Citizens & Peoples Natl. Bank v. L. & N. R. R. Co.*, 319.

LARCENY.**"CHATTELS" EMBRACE ALL KINDS OF PROPERTY LESS THAN A FREEHOLD.**

2. The term "chattels" embraces generally every species of property, movable or immovable, which is less than a freehold. *Curington v. State*, 494.

DESCRIPTION OF PROPERTY AS FORD TOURING CAR SUFFICIENT.

1. A "Ford touring car" is a sufficient description of the article alleged to have been stolen, to bring the offense within the provisions of Section 3288, General Statutes of 1906. *Lasher v. State*, 712.

EVIDENCE HELD TO SUPPORT A CONVICTION.

2. Evidence examined and found sufficient to support a verdict of conviction. *Hamlin v. State*, 217.

Larceny.—(*Continued.*)

FOR RECEIPT OF MONEY THROUGH CONCERTED FRAUD,
THERE MAY BE A CONVICTION; ALLEGATION OF
OWNERSHIP HELD SUFFICIENT.

Where E. using the name of J. sends a telegram to A. asking for a remittance of money by wire to J. and the remittance made by wire to J. is delivered to K., an accomplice of E., the receipt for the money being signed by K. in J.'s name, and the money delivered by K. to E., Jones knowing nothing of the transaction, in an information charging E. with larceny of the money, the ownership of the money was not improperly alleged to be in J., and E. having received the money through his concerted fraud, may be convicted of larceny. *English v. State*, 70.

HOGS ARE "PROPERTY," SUBJECT OF LARCENY WITHIN
THE STATUTORY DESCRIPTION.

1. Hogs are within the description of property which is made the subject of larceny under Sec. 3288, Gen. Stats. of 1906, Florida Compiled Laws of 1914, and the larceny of hogs of the value of twenty dollars or more is punishable under this statute. *Ourington v. State*, 494.

LIMITATION OF ACTIONS.

ACCOUNTING BY CARRIER FOR OVERCHARGES GOV-
ERNED BY GENERAL STATUTE.

The provision of Section 11, Chapter 6527, Acts of 1913, that "all suits under *this Act* shall be brought within two years after the commission of the alleged wrong or injury, except in cases where the Railroad Commissioners have heretofore been or shall hereafter be, by refusal of such railroad or common carrier to observe the rates, rules, schedules or regulations by the Railroad Commissioners, compelled to resort to suits to enforce such rates, rules, schedules or regulations, and in such cases suits for such loss, damage, or penalty may be brought within twelve months after the termination of such suits in favor of the Railroad Commissioners," does not apply to suits brought under Chapter 5616, Acts of 1907, "to compel" "accountings and payments" by common car-

Limitation of Actions.—(*Continued.*)

riers for transportation charges collected from individuals in violation of rates fixed by the Railroad Commissioners under the statute. Such special statute of limitations not being applicable, the general statute of limitation was properly applied by the trial court in an accounting there being had pursuant to the provisions of Chapter 5616, Acts of 1907. *State of Florida v. Florida East Coast Ry.*, 411.

ACKNOWLEDGMENT OF INDEBTEDNESS RAISES IMPLIED PROMISE TO PAY.

2. Where there is a direct and unqualified admission in writing of a previous subsisting debt which the party is willing to pay, a promise to pay is raised by implication of law. *Hall et al. v. Brown*, 481.

FROM WRITTEN ACKNOWLEDGMENT A PROMISE TO PAY WILL BE INFERRED.

1. Where there is a distinct acknowledgment in writing of a debt as still subsisting as a personal obligation of the debtor, before it is barred by the statute of limitations, a promise to pay will be inferred. *Hall et al. v. Brown*, 481.

LIEN EXPRESSLY RESERVED ENFORCEABLE AFTER NOTES BARRED BY LIMITATIONS.

When in a deed conveying title to lands, a lien for purchase money is *expressly* reserved in the conveyance, it may be enforced in equity, though actions on the notes given for the amount due are barred by the statute of limitations. *Wilson et al. v. Davis*, 727.

PROMISE CONSTRUED AS ONE TO MAKE A PAYMENT ON ACCOUNT AND NOT IN FULL SETTLEMENT.

3. Where the defendant made several promises "to liquidate the note," "to pay something on it," "to pay it as fast as possible," the promise implied in the statement that he might "be able by the first of July to send you \$500.00," must be taken in connection with these and other statements, and that the \$500.00 was to be a part payment on

Limitation of Actions.—(*Continued.*)

account of the entire indebtedness which he had repeatedly acknowledged, and not a promise to pay \$500.00 in full settlement of the note. *Hall et al. v. Brown*, 481.

STATUTE GIVES DEBTOR BENEFIT OF FOREIGN LIMITATIONS; STATUTE OF FORUM MAY BE PLEADED TO ACTION ON NOTE NOT BARRED WHERE MADE; LIMITATION GOVERNED BY LEX FORI.

2. Section 1726, General Statutes of 1906, "When the cause of action has arisen in another State or Territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State." Construed, to give a debtor against whom a cause of action in another State or Territory, or in a foreign country, the benefit of the statute of limitations of those jurisdictions if they are shorter than in this State, and does not deprive him of his privilege of pleading the Florida statute, even if the cause of action is not barred by the limitation statutes of any other State or Territory, of foreign State. *Brown v. Case*, 703.

MANDAMUS.

MANDAMUS IN A PROCEEDING AT LAW REVIEWABLE ON WRIT OF ERROR.

Mandamus proceedings in the Circuit Court may be reviewed by the Supreme Court on a writ of error, but not on an appeal. *State ex rel. Martin v. Board of County Commissioners*, 332.

NOT GRANTED TO COMPEL DISREGARD OF CARRIER'S ILLEGAL CONTRACT WHERE THERE ARE OTHER REMEDIES.

Where a common carrier in making and executing a contract violates its legal duties to its patrons, and a remedy therefor is afforded by law through action taken by the Railroad Commissioners or through proceedings to annul the contract if found to be *ultra vires*, a writ of mandamus to compel a disregard of the contract will not be granted. *Jacksonville Term. Co. et al. v. Millner*, 602.

MASTER AND SERVANT.**AUTOMOBILE DANGEROUS INSTRUMENTALITY, NOT-WITHSTANDING OPERATION BY ANOTHER THAN OWNER.**

5. Chapter 7275, Acts of 1917, treats the automobile when operated on the public highways as a dangerous instrumentality so as to require special regulation and control under the police power, and it is not divested of its dangerous character in an action for damages caused by the negligence of the operator who is using the car with the owner's knowledge or consent. *Southern Cotton Oil Co. v. Anderson*, 441.

EMPLOYER NOT INSURER AGAINST EMPLOYEE'S OWN CARELESSNESS.

2. The employer is not an insurer of his employee against injuries resulting to the latter solely from the latter's own carelessness and negligence and from no other proximate cause. *Long v. Pughsley*, 278.

FAILURE TO WARN OF OBVIOUS DANGERS NOT ACTION-ABLE.

1. Where all of the dangers incident to the performance of any kind of work are so obvious, patent, open and plain to any mentally normal adult, that no information, cautions or instructions with reference thereto are necessary to be given to the adult employee doing such work to acquaint him therewith, it is not actionable negligence if the employer fails to give such cautions, information and instructions. *Long v. Pughsley*, 278.

LETTER HELD NOT A DISCHARGE.

1. Plaintiff having been employed by defendant for a stated period, before its expiration, received a communication from him as follows: "As I promised Harry's wife I would give him the management of the store on his return before I employed you can you take the night shift and arrange to trade nights with him occasionally. As you know the position we are placed in with old employees I have no other choice than to ask this of you." Plaintiff interpreted this communica-

Master and Servant.—(Continued.)

tion as a discharge and thereupon quit the service of defendant and sued for the amount of salary which he would have been entitled to had he rendered the service for the period of his employment. *Held*, that the language employed in the communication is not reasonably susceptible of the interpretation given it by plaintiff and that he is not entitled to a recovery upon the theory that it amounts to a discharge. *Hill v. Peddy*, 832.

OWNER ENTRUSTING MOTOR VEHICLE TO ANOTHER IS LIABLE FOR HIS NEGLIGENCE.

1. A motor vehicle operated on the public highways is a dangerous instrumentality, and the owner who entrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is entrusted. *Southern Cotton Oil Co. v. Anderson*, 441.

OWNER OF DANGEROUS AGENCY LIABLE FOR INJURIES THROUGH SERVANT'S NEGLIGENCE.

6. In entrusting a servant with a highly dangerous agency the master puts it in his servant's power to mismanage it, and as long as it is in his custody or control under such authority the master is liable for any injury committed through the servant's negligence. *Southern Cotton Oil Co. v. Anderson*, 441.

OWNERS OF MOTOR VEHICLES LIABLE UNDER DOCTRINE OF RESPONDEAT SUPERIOR.

4. The Legislature under its police power to protect the public from dangerous instrumentalities using the highways has imposed rigid restraints, regulations and restrictions upon the use of motor vehicles, thus recognizing the danger from their operation, which makes owners liable in damages under the doctrine of *respondeat superior* as applied to dangerous agencies. *Southern Cotton Oil Co. v. Anderson*, 441.

PLAINTIFF HAS BURDEN OF PROVING AGENCY ALLEGED.

1. In an action for damages for the wrongful death of one caused by a railroad corporation acting through its special

Master and Servant.—(Continued.)

agent, servant or employee, the plea of not guilty does not admit that the person through whose conduct the deceased was killed was the special agent, servant or employee of the defendant, and the burden of proving the relation is upon the plaintiff. *Varnes v. S. A. L. Ry. Co.*, 624.

RESPONSIBILITY FOR CUSTODY OF DANGEROUS APPLIANCE CANNOT BE SHIFTED TO SERVANT.

2. "The servant is empowered by the master to discharge certain duties, and it is incumbent upon him to exercise the same care and attention which the law requires of the master; and if that care and attention be about the management and custody of dangerous appliances, the master cannot shift the responsibility connected with the custody of such instruments to the servant to whom they have been intrusted, and escape liability therefor. This rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, engines, or instruments—liable, if negligently managed, to result in great damage to others." *Southern Cotton Oil Co. v. Anderson*, 441.

RESPONSIBILITY OF OWNER OF AUTOMOBILE EXTENDS TO ITS USE BY ONE WITH HIS KNOWLEDGE OR CONSENT.

3. An automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used and his liability extends to its use by any one with his knowledge or consent. *Southern Cotton Oil Co. v. Anderson*, 441.

RULE THAT VERDICT ACQUITTING SERVANT EXONERATES MASTER NOT CHANGED BY STATUTE.

2. Under the pleadings and the evidence in the case at bar, Sections 3148 and 3149 of the General Statutes of Florida of 1906, do not change this rule. *Williams v. Hines*, 690.

Master and Servant.—(*Continued.*)

STATUTORY REGULATION OF PAYMENT FOR LABOR CONSTITUTIONAL.

2. Chapter 6914, Acts of 1915, as made applicable to the merchandise order given in payment for labor in this case, is not unconstitutional. *Praire Pebble Phos. Co. v. Silverman*, 541.

UNDER DOCTRINE OF RESPONDEAT SUPERIOR, ACQUITTAL OF SERVANT EXONERATES MASTER.

1. Where the common law rule prevails, unmodified by statute, the weight of authority supports the holding that in an action against a principal, or master, and his agent, or servant, for damages resulting solely from the negligence of the agent, or servant, acting as such, a verdict of the jury exonerating the agent, or servant, exonerates the principal or master. They are in no sense joint tort feorsors, but the basis of the liability of the principal, or master, is the well-known doctrine of *respondeat superior*. *Williams v. Hines*, 690.

VERDICT EXONERATING NEGLIGENT SERVANT, BUT HOLDING MASTER LIABLE, ERRONEOUS.

5. Where a jury by its verdict in an action for damages for injuries sustained brought against a master and his servant jointly, recovery thereof being based solely upon the negligent act of the servant, exonerates such servant, but finds the master guilty, such verdict as to such master is erroneous, and should be set aside, or judgment for the defendant master entered, notwithstanding such verdict. *Williams v. Hines*, 690.

MECHANICS' LIENS.

LABORERS AND MATERIALMEN CANNOT HAVE LIEN AGAINST MARRIED WOMEN'S SEPARATE ESTATE, WHEN NOT IN PRIVITY WITH HER.

8. There can be no lien against the separate statutory property of a married woman for labor done or materials furnished

Mechanics Liens.—(Continued.)

by sub-contractors in the erection of a building on her separate statutory property, with whom she was not in privity. *Lowry et al. v. Downnig Mfg. Co. et al.*, 745.

MATERIALMAN MUST SHOW MARRIED WOMAN'S KNOWLEDGE AND ASSENT TO FURNISHING OF MATERIAL.

1. The complainant in a suit in equity who seeks to subject a lot which is a married woman's separate statutory property, to the payment of claims of the complainant as a material man who is alleged to have furnished such material to a contractor who erected a building upon the married woman's property must show knowledge upon the part of the married woman that the material was being furnished by the complainant and used by the contractor and that she assented to such furnishing by complainant and use of the material upon the conditions alleged. *Agin et al. v. Gainesville Planing and Coffin Co.*, 679.

STATUTORY LIENS HELD NOT TO APPLY TO SEPARATE PROPERTY OF MARRIED WOMEN.

3. Mechanics and material men's liens provided for under Sections 2189a to 2211, Florida Compiled Laws, 1914, do not apply to the separate property of married women. *Agin v. Gainesville Planing and Coffin Co.*, 679.

MORTGAGES.

See Attorney and Client.

ANSWER ON FORECLOSURE SETTING UP FAILURE OF CONSIDERATION INSUFFICIENT WHERE EXTENT OF DAMAGE NOT AVERRED.

2. In a suit to enforce a mortgage lien upon land to secure the purchase price of the lands and certain live stock an answer which undertakes to set up the defense of failure or partial failure of consideration of the notes which the mortgage was given to secure, by averring that the complainant did not at the time of the sale own a "great portion" of the live

Mortgages.—(Continued.)

stock, is insufficient where the answer fails to aver in which manner and to what extent the defendant has suffered damage by such averred failure of consideration. *Hanley v. Bullard et al.*, 578.

ASSIGNMENT OF DEBT CARRIES SECURITY.

5. A mortgage of real estate is regarded as an accessory to the debt secured by the mortgage, and the assignment of the debt *ipso facto* carries with it the mortgage security. *Evins v. The Gainesville Natl. Bank et al.*, 84.

CIRCUIT COURT, UNDER EQUITY RULE 89, MAY ENTER DEFICIENCY DECREE.

2. (Foreclosure of Mortgage—Decree for Deficiency—Power of Court.)—Circuit Courts, in cases for the foreclosure of mortgages, under Equity Rule 89 of the Rules of the Circuit Court—In equity, have the power to enter a decree against the mortgagor for any balance that may be found to be due to the plaintiff, over and above the proceeds of sale. *Realty Mortgage Co. v. Moore*, 2.

CONSTITUTE LIEN AND NOT CONVEYANCE.

3. A mortgage, in this State, is a specific lien upon property, and is not, of itself, a conveyance of the legal title. *Evins v. The Gainesville Natl. Bank et al.*, 84.

CONVEYANCE OF MORTGAGED PROPERTY SATISFIES MORTGAGE; MORTGAGEE'S ATTORNEY, AFTER SATISFACTION, CANNOT PROCEED IN SUIT FOR ALLOWANCE OF FEES.

4. Where an attorney is employed to foreclose a mortgage and there is settlement of the suit, carried on through and by the advice and with the consent of such attorney, by an acceptance of a deed to the mortgaged property, this is a satisfaction of the mortgage and the attorney can not proceed with the suit for the purpose of collecting his fees and have such fees allowed by the court without at least divulging

Mortgages.—(Continued.)

to the court the facts and giving his client an opportunity to contest suit fees. *United States Savings Bank v. Pittman et ux et al.*, 423.

DEFENSES OF MORTGAGOR SUFFICIENT TO DENY RIGHT TO DEFICIENCY DECREE AFTER CONVEYANCE SUBJECT TO MORTGAGE ENUMERATED.

6. (Foreclosure of Mortgage—Conveyance of the Mortgaged Property).—Where a mortgagor has conveyed the mortgaged property, subject to the debt secured by the mortgage, before the maturity, before the maturity of the debt, and the conveyance recites that the grantee assumes and promises to pay the debt, but does not pay it on its maturity, nor afterwards; and the mortgagee grants extensions of time for the payment of the debt to the grantee of the mortgagor, against the expressed wish of the mortgagor, and continues to grant extensions for a long period of time after knowledge that such extension is against the wish of the mortgagor, and the debt still remains unpaid, begins a foreclosure against the mortgagor and the grantee of the mortgaged property seeking to sell the mortgaged property in satisfaction of the debt secured by the mortgage in the event the property does not sell for sufficient to satisfy the same, then for a deficiency decree against the mortgagor for such balance, it is incumbent on the mortgagor, in order to excuse himself for such deficiency decree, to allege and to prove that such extensions were against his wish, resulting in loss in value of the mortgaged property, or that he had requested a foreclosure of the mortgage while the property was sufficient to satisfy the demand. It is not necessary that such mortgagor should have used any precise words or expression in making the request to foreclose. His objection to such extension or extensions, the pointing out to the mortgagee of the danger in the depreciation of the mortgaged property after the maturity of the debt, in connection with the course of dealing by the mortgagee with the grantee, may be sufficient to deny the right to a deficiency decree. *Realty Mortgage Co. v. Moore*, 2.

Mortgages.—(Continued.)**"DEFICIENCY DECREE" DEFINED.**

3. A deficiency decree in a mortgage foreclosure suit is a decree for the balance of the indebtedness after applying the proceeds of a sale of the mortgaged property to such indebtedness. *Commercial Bank v. First Natl. Bank*, 685.

DISCRETION IN AWARDING DEFICIENCY DECREE NOT AFFECTED BY EQUITY RULE 89.

3. (Foreclosure of Mortgages—Equity Rule 89).—Equity Rule 89 of the Rules of the Circuit Court in Equity, granting to such courts in suits in equity for the foreclosure of mortgages, the power to render a decree against the mortgagor for any balance that may be found to be due the plaintiff, over and above the proceeds of the sale or sales of the mortgaged property, does not deprive the court of its sound judicial discretion to determine the right to such deficiency decree. *Realty Mortgage Co. v. Moore*, 2.

FRAUD IN SECURING A PURCHASE-MONEY MORTGAGE LIEN NOT A DEFENSE WHERE NO DAMAGE SHOWN.

3. Fraud averred to have been practiced by complainant in securing a mortgage lien is without merit as a defense to a foreclosure of the lien where no injury or damage to the defendant is shown to have resulted to him from such averred fraud. *Hanley v. Bullard et al.*, 578.

INTEREST OF MORTGAGEE DEFINED.

4. A mortgagee, either before or after default in payment, has no title by virtue of his mortgage to the mortgaged real estate. His interest is simply a specific lien for the security of the debt mentioned in the mortgage, and he can acquire the legal title as against the mortgagor, or his grantees, only by outbidding every other person at the foreclosure sale. *Evins v. The Gainesville Natl. Bank et al.*, 84.

Mortgages.—(Continued.)**MORTGAGEE BY DEALINGS WITH MORTGAGOR'S GRANTEE MAY LOSE RIGHT TO DEFICIENCY DECREE.**

5. (Foreclosure of Mortgage—Right to a Deficiency Decree).—A mortgagee may so deal with the mortgagor's grantee of the mortgaged premises as to deny to the mortgagee the right to a deficiency decree against the mortgagor. *Realty Mortgage Co. v. Moore*, 2.

MORTGAGEE BY HIS CONDUCT HELD TO HAVE LOST RIGHT TO DEFICIENCY DECREE AFTER CONVEYANCE.

7. (Foreclosure of Mortgage—Extensions of Time, Deficiency Decree).—Where the mortgaged property was sufficient to pay the debt on its maturity, and the mortgagee grants extension of time for its payment without the knowledge of the mortgagor, and when the mortgagor hears of it, protest against such extension made to the grantee of the mortgaged property, protest against the same and denies his liability by reason of such extension, points out the danger of the mortgaged property depreciating to the mortgagee, and thereafter other and continued extensions covering a period of several years after the debt became due, during which extended time the mortgaged property depreciates by reason of a freeze, and thereafter the mortgage is foreclosed and the mortgaged property did not sell for sufficient to pay the debt, the mortgagee has not the right to a decree for the deficiency. *Realty Mortgage Co. v. Moore*, 2.

POWER UNDER EQUITY RULE 89 AS TO RENDITION OF DEFICIENCY DECREE HELD DISCRETIONARY.

8. (Foreclosure of Mortgage—Deficiency Decree—Equity Rule 89).—The power vested in Circuit Courts, in Equity, by Rule 89 of the Circuit Courts in Equity, for the foreclosure of mortgages declaring that a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of sale or sales, is a discretionary one, and may be granted or denied according to the facts and circumstances in each case. *Realty Mortgage Co. v. Moore*, 2.

Mortgages.—(Continued.)**RIGHT TO DEFICIENCY MUST BE DETERMINED WITH REFERENCE TO PLEADING AND EVIDENCE.**

1. (Foreclosure of Mortgage—Decree for Deficiency).—Upon the foreclosure of a mortgage upon real estate, the right of the complainant to a decree against the mortgagor for any balance that may be found to be due to the plaintiff over and above the proceeds of sale must be determined with reference to the pleading in connection with the evidence in each case. *Realty Mortgage Co. v. Moore*, 2.

THAT WORD "NOTE" IN ACCELERATION OF MATURITY CLAUSE IS SINGULAR INSTEAD OF PLURAL HELD NOT MATERIAL.

4. Where a mortgage is given to secure the payment of three promissory notes and the provisions of the mortgage clearly show that it was the intention of the parties that the mortgagee should have the privilege of electing to treat the entire debt as due upon the failure of the maker of the notes to pay the first or second note at maturity, the omission of the letter "s" from the word "note" appearing in the clauses referring to the indebtedness which the mortgage was given to secure will not defeat the mortgagee's right under the mortgage to foreclose it for the entire debt upon the failure of the maker to pay the note first becoming due. *Hanley v. Bullard et al.*, 578.

WHEN ASSIGNEE OF MORTGAGE ASKED DEFICIENCY JUDGMENT AGAINST ORIGINAL MORTGAGOR FOR PAYMENTS IMPROPERLY RETAINED, THE WORD "DEFICIENCY" IS SURPLUSAGE.

4. Where, in a suit brought for the foreclosure of a mortgage, there is a cross-bill to foreclose a senior mortgage upon a portion of the same property, which cross-bill contains a prayer for a "deficiency" decree against a party defendant in said suit, who is a former owner of such senior mortgage and the indebtedness secured thereby, for moneys received by such former owner in part payment of such indebtedness, but not applied thereon, which he has no right to retain,

Mortgages.—(Continued.)

the word "deficiency" being inapt, may be disregarded, and a decree entered in accordance with such prayer. *Commercial Bank v. First Natl. Bank*, 685.

WHERE DEFICIENCY DECREE SOUGHT, DEFENSE MUST BE PRESENTED IN DUE COURSE OR REASONS GIVEN; "FORECLOSURE PROCEEDING."

4. (Foreclosure of Mortgages—Deficiency Decree).—Since the foreclosure proceeding is the judicial means by which certain property is subjected to the payment of the debt, and in which the amount of the debt is ascertained and decreed to be paid, it follows that any defense that may be offered to a decree of foreclosure, or against a personal decree, or for any balance that may be found due to the plaintiff over and above the proceeds of sale, should be presented in due course of the proceedings, or a sufficient reason given for not doing so. *Realty Mortgage Co. v. Moore*, 2.

MOTIONS.

BASED ON FACTS NOT APPARENT ON FACE OF RECORD MUST BE SUPPORTED BY AFFIDAVITS OR OTHER PROOF.

10. Where a motion is grounded on facts that are neither apparent from the face of the record, or papers on file in the case, nor within the judicial knowledge of the court, it must be supported by affidavits or other proof. *Stewart v. Preston et al.*, 473.

MUNICIPAL CORPORATIONS.

ADJUDICATION THAT CORPORATION HAS NO LEGAL EXISTENCE HELD NOT TO DEFEAT RIGHT TO REMEDY DEFECT BY CURATIVE ACT.

2. The adjudication by a court that a municipal corporation has no legal existence because of the ineligibility as incorporators of certain persons participating in the proceedings to create such corporation does not defeat the right of the Legislature by subsequent curative act to remedy the defect. *Schultz et al. v. State ex rel. Swearingen*, 564.

Municipal Corporations—(Continued.)

ASSESSMENT UNDER A RULE APPORTIONING PAVING EXPENSES DIFFERENT FROM THAT DESIGNATED BY STATUTE HELD INVALID.

2. A city council has no authority to adopt a rule for apportioning the expense of paving, different from that expressly designated in the statute, and when a different rule is adopted, the assessment is invalid. *Carr et al. v. City of Kissimmee*, 754.

CITY'S FAILURE TO FOLLOW PROCEDURE PRESCRIBED IN ACT AUTHORIZING IMPROVEMENT MAKES ASSESSMENT UNENFORCEABLE.

1. When the method and procedure for the enforcement of a lien for sidewalk construction is prescribed in the act authorizing the improvements, the city is bound to follow the method and procedure prescribed, and the failure to do so makes an assessment for such tax unenforceable. *Carr et al. v. City of Kissimmee*, 759.

DESCRIPTION IN CAPTION OF CITATION IN PROCEEDINGS UNDER TAX LAWS OF A CITY AIDED BY DESCRIPTION IN BODY.

1. An uncertain description of property in the caption of a citation in a proceeding in rem may be aided and the notice made sufficient by a correct description in the body of the citation, since reasonable diligence would require the reading of the entire notice. *West 132 Feet et al. v. City of Orlando et al.*, 233.

LEGISLATURE MAY REMEDY DEFECTS IN ORGANIZATION BY CURATIVE ACT.

1. The Legislature has power by a curative act to remedy defects of procedure in the organization of a municipal corporation created, or attempted to be created, under the provisions of Sec. 999 et sequi, Gen. Stats. 1906, if the omission, or provision of the statute violated, could have been originally dispensed with. *Schultz et al. v. State ex rel. Swearingen*, 564.

Municipal Corporations.—(Continued.)**ORDINANCE PROHIBITING MEETINGS ON STREETS WITHOUT PERMISSION HELD UNREASONABLE.**

1. A city ordinance which prohibits the holding of any public meeting or meeting of any character upon any street of the city or within any city park without first obtaining permission in writing from the mayor or a majority of the city councilmen, in the absence of any charter provision definitely and specifically empowering the city to prohibit public meetings in the streets or parks of the city, is void for unreasonableness. *Anderson v. Tedford*, 376.

WHEN ASSESSMENT FOR PAVING UNDER FRONT-FOOT RULE IS PRESCRIBED, USE OF DIFFERENT RULE INVALID.

1. The method of paying for paving improvements is a matter of legislative discretion, and when it is prescribed in the act authorizing the improvements that the assessment shall be made under what is known as the "front foot" rule, an assessment based on a different rule is invalid. *Carr et al. v. City of Kissimmee*, 754.

WHEN CITY MAY EXERCISE POWER OVER PUBLIC MEETINGS STATED.

2. Under the general power granted to municipalities to preserve the public peace and morals and for the suppression of riots and disorderly assemblies, a city's power over public meetings exists when they create public disturbances, become nuisances or create or threaten some tangible public or private mischief. *Anderson v. Tedford*, 376.

WHEN REGULARITY OF PROCEEDINGS CANNOT BE PUT IN ISSUE BY DEFENDANTS IN WRIT.

4. The purchaser of property at a public sale under a foreclosure decree filed his petition for writ of assistance against parties who were strangers to the foreclosure proceedings and who by their answer failed to show that they had any interest in the property except that of bare possession and failed to show when such possession began, but who assumed

Municipal Corporations.—(Continued.)

to defend on behalf of others as alleged owners: *Held*, That where the court in the foreclosure proceeding appeared on the face of the record to have had jurisdiction, the regularity of such proceeding could not be put in issue by such persons in resisting the application for a writ of assistance. *West 132 Feet et al. v. City of Orlando et al.*, 233.

WRITTEN AGREEMENT BY OWNERS OF ADJACENT LOTS TO OPEN AND MAINTAIN ALLEY CONSTRUED AS EASEMENT.

A written agreement under seal between the owners of adjacent lots relating to the opening and maintaining of an alley running across the ends of the two lots, construed to be an easement created by the parties over the two lots for the benefit of the owners respectively. *Sewell et al. v. Burdine*, 718.

NAMES.**WHEN PROOF OF IDENTITY OF PARTIES MAY BE REQUIRED STATED.**

1. While a deed of conveyance of land may be properly executed by the grantor when the initials only of his given name are used, yet when the first name of a grantee is given in full in a conveyance and the residence of such grantee is specifically given, a conveyance of the land by such grantee who executed his deed by using the initials only of his given names and by giving in the deed his residence as being in a State other than the one of which he was a resident when the land was conveyed to him, and in a trial of title, proof of the identity of the person whose name and residence are differently given in the chain of title, is demanded, such proof of identity by some substantial evidence may be required upon appropriate and timely objections to muniments of title showing these differences. *Bacon v. Feigel et al.*, 566.

NEGLIGENCE.

See Carrier.

NEW TRIAL.

See Appeal and Error.

DENIED WHERE VERDICT WAS PROPER UNDER EVIDENCE.

Where the verdict is a proper one on a fair consideration of all the evidence and no rule of law or procedure has been violated to the material injury of either party, a new trial should not be granted. *Jackson Bros. L. Co. et al. v. Yaeger & McCaskill*, 611.

GRANTED WHERE VERDICT WHOLLY UNSUPPORTED.

2. Where a verdict is wholly unsupported by the evidence, it is the duty of the trial court to set it aside upon motion. *Newcomb et al. v. Belton*, 570.

MOTION FOR NEW TRIAL HELD SUFFICIENTLY TO INDICATE ERROR IN CHARGE AS TO ALLOWANCE OF INTEREST ON FIRE LOSS.

7. Where a motion for a new trial is sufficient to direct the attention of the trial court to harmful error in the general charge given, such error should be corrected. *Natl. Union Fire Ins. Co. v. Cone*, 265.

QUESTION OF FACT ON CONFLICTING EVIDENCE FOR JURY.

5. A question of fact upon which the evidence conflicts is peculiarly within the province of the jury to decide. *Natl. Union Fire Ins. Co. v. Cone*, 265.

OFFICERS.

LEGISLATURE MAY IMPOSE ADDITIONAL DUTIES ON CONSTITUTIONAL OFFICERS, WHERE NOT FORBIDDEN BY THE ORGANIC LAW.

12. The Legislature having all the lawmaking power of the State that is not withheld by the Constitution, may prescribe duties to be performed by officers expressly provided for by

Officers.—(Continued.)

the Constitution, in addition to the duties of those officers that are defined in the Constitution, where not forbidden by the organic law. *Whitaker v. Parsons*, 352.

LEGISLATURE MAY PRESCRIBE ADDITIONAL DUTIES TO BE PERFORMED BY THE ADMINISTRATIVE OFFICERS OF THE EXECUTIVE DEPARTMENT.

13. The Constitution does not withhold from the Legislature the power to prescribe additional duties to be performed by the State Treasurer or others of "the administrative officers of the executive department" that are not inconsistent with their duties as defined by the Constitution; and such duties may be to act as members of Boards or Commissions in conjunction with other officers who are provided for by statute, the commissions issued to constitutional officers being sufficient to cover any duties imposed upon them by law. *Whitaker v. Parsons*, 352.

PARENT AND CHILD.

See Husband and Wife.

PARTIES.

SCOPE OF ANSWER TO SUPPLEMENTAL PLEADING; NEW PARTY MAY BE HEARD ON ALL MATTERS AFFECTING HIS INTEREST.

5. Where a new pleading between the original parties is confined strictly to supplemental matter, the answer thereto should likewise be confined to such supplemental matter; but where a new party, who is shown to have had an interest in the subject-matter of the suit before the suit was instituted, is brought into a cause, he has a substantial right to be heard upon all matters which materially affect his property interest. *Stokely et al. v. Conner et al.*, 89.

PARTITION.**WHEN NEW PARTY DEFENDANT MAY PLEAD MATTERS OF DEFENSE PREVIOUSLY PLEADED.**

4. A new party defendant in a partition suit, brought in after the entry of a decree determining the rights and interests in the property of the respective parties then before the court, may set up matters of defense previously pleaded by his grantor who was an original defendant; when it appears that the conveyance was made prior to the commencement of the action though not recorded until after the action was begun; no special circumstances being shown to preclude such defense. *Stokely et al. v. Conner et al.*, 89.

PARTNERSHIP.**PARTNERSHIP RELATION IS QUESTION OF LAW.**

2. Whether the facts constitute a partnership relation between persons is a question of law. *Mach v. Mayo*, 372.

STOCKHOLDERS OF DEFECTIVE CORPORATION NOT JOINTLY LIABLE; JOINT JUDGMENT AGAINST PARTIES NOT JOINTLY LIABLE HELD ERRONEOUS.

In an action against stockholders of a supposed corporation, where for failure to comply with the statute as to the incorporation, the statute imposes a liability as "members of a general partnership," and the action against the defendants is "as individuals and as co-partners," but some of the defendants are not jointly liable with the others, a joint judgment against them all is erroneous. *Graham et al. v. Sewell et al.*, 720.

PAYMENT.**CONTRACT FOR SALE OF GROWING ORANGES INJURED BY FROST CONSTRUED AS TO CREDITS TO BE ALLOWED.**

2. A contract between the parties for the sale and purchase of the oranges growing upon the trees of several groves, under the terms of which the purchaser paid the sum of fifteen

Payment.—(Continued.)

hundred dollars upon the execution of the contract, half of which sum was to be applied to the payment for the early bloom fruit, which was to be removed by him before December 25th, and half to the payment for the late bloom fruit to be removed in March, is entitled to a credit of the remaining seven hundred and fifty dollars upon a demand for payment for the fruit of the early bloom, which was not removed at the date agreed upon by the purchaser, and which was lost by injurious effects of a frost occurring in January. *Standard Growers' Exchange v. Martin*, 864.

PLEADING.

See Master and Servant, and Parties.

ALLEGATION THAT TOMATOES READY FOR SHIPMENT MUST BE "PACKED AND SHIPPED IMMEDIATELY" MEANS THAT THEY MUST BE PACKED AND SHIPPED WITHOUT DELAY.

4. An allegation in a declaration for special damages accruing because of the negligent failure to deliver crate material for use in shipping tomatoes which asserts that when the tomatoes become ripe and ready for packing and shipping they must be "packed and shipped immediately" to prevent them from becoming overripe and reaching the market in a deteriorated and unmarketable condition, will be construed to mean that when ripe and ready for packing and shipping they must be packed and shipped without delay. *Florida East Coast Ry. Co. v. Peters*, 382.

"INDUCEMENT" IS INTRODUCTORY MATTER EXPLAINING SUBJECT OF DECLARATION OF PLEA.

2. Inducement in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea and which is necessary to elucidate or explain it. *Varnes v. S. A. L. Ry. Co.*, 624.

Pleading.—(*Continued.*)**MATERIAL ALLEGATIONS ARE TAKEN AS TRUE IN THEIR USUAL SENSE, IF MATERIAL.**

3. A party is bound by the allegations of fact in his own pleading, and when there is no denial of such allegations they are accepted as true if material and that meaning ascribed to the words that is usually intended by the use of such words. *Florida East Coast Ry. Co. v. Peters*, 382.

THE MERE ABSENCE OF SIMILITER TO THE PLEAS IS NOT GROUND FOR REVERSAL.

After a trial on the merits without objection and verdict upon the matters embraced in the declaration and plea, the mere absence of a similiter to the plea is not alone ground for reversal, the similiter not having been insisted upon by the defendant nor required by the court. Failure to file a similiter in such case is waived by going to trial. *Carlton-Moore Co. v. Vandcripe*, 512.

PRINCIPAL AND AGENT.**COMPLAINANT, RELYING ON RATIFICATION, MUST SET OUT FACTS.**

6. Where complainant relies for his cause of action on a ratification of an unauthorized contract by a trustee or agent he must set out the facts necessary to constitute such ratification. *Haimovitz v. Hawk, Sr., et al.*, 272.

FACTS SHOWING VALIDITY OF ORIGINALLY INVALID INSTRUMENT EXECUTED BY AGENT MUST BE ALLEGED.

7. When complainant asserts that validity has been imparted to an instrument invalid in its inception because of absence of authority in its makers to execute it, and upon the validity of which his right of recovery depends, he should set up the facts imparting such validity in order that defendants may know of what the cause of action consists. *Haimovitz v. Hawk, Sr., et al.*, 272.

PROCESS.

SERVICE BY PUBLICATION MUST COMPLY STRICTLY WITH STATUTE.

2. Where constructive service by publication is substituted by statute for personal citation, a strict compliance with the statutory provisions is essential to confer jurisdiction. *West 132 Feet et al. v. City of Orlando et al.*, 229.

SERVICE BY PUBLICATION WHEN AMBIGUOUS IS NOT A VALID NOTICE.

3. Where the law authorizes described land to be made defendant in a suit for enforcing a lien thereon, there should be no material variance between the land described in the pleadings and that described in the notice by publication, and where the description in the notice as published is ambiguous and may describe two distinct bodies of land, such description is too indefinite to constitute a valid notice by publication. *West 132 Feet et al. v. City of Orlando et al.*, 229.

PROPERTY.

"PERSONAL CHATTELS" DEFINED.

3. Personal chattels are things movable which may be carried about by the owner, such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another. *Ourington v. State*, 494.

QUIETING TITLE.

COMPLAINANT MUST SHOW VALIDITY OF HIS OWN TITLE AND INVALIDITY OF THAT OF OPPOSING PARTY.

2. In proceedings to remove a cloud from and quiet title to certain land the complainant must show with clearness, accuracy and certainty the validity of his own title and the invalidity of the title of the opposing party. *Dayton v. Patton*, 763.

Quieting Title.—(Continued.)**COMPLAINANT NEED NOT TRACE TITLE FARTHER THAN TO COMMON SOURCE.**

1. In a suit in equity to remove an alleged cloud from and quiet title to certain land where both complainant and defendant claim title to the land in controversy from a common source, it is not incumbent upon complainant to trace his title further than to such common source of title. *Dayton v. Patton*, 763.

RAILROADS.**AUTOMOBILE STOPPING ON TRACK PROXIMATE CAUSE OF COLLISION.**

1. "When the driver of an automobile attempts to cross a railroad track at a road crossing and has ample time to do so, but his engine chokes down and the automobile stops upon the railroad track, and it is not alleged in the declaration that the choking down of the engine was caused by the defective condition of the railroad crossing, the proximate cause of the accident is the stopping of the automobile, and the railroad is not guilty of negligence in not assuming that it would break down and stop on its track, provided that when the railroad employees saw that it had stopped on the track they at once did everything in their power to stop the train." *Bagdad Land & Lumber Co. v. Moneyway*, 784.

ORDER OF RAILROAD COMMISSIONERS, COMMANDING OPERATION OF TRAINS, NOT ENFORCEABLE, WHERE NOT REASONABLE AND JUST.

An order of the Railroad Commissioners commanding a railroad company "to re-establish, reinstate and operate" between points in this State, one of the points being near the State line, two passenger trains that had been operated as interstate trains, but had been discontinued on account of inability to get coal for engine fuel, will not be enforced by mandamus, since even if on the facts shown the order is not in effect to reinstate an interstate train, not within the authority of the Commissioners, the circumstances shown as to local conditions, the service being rendered by other trains,

Railroads.—(*Continued.*)

meagerness of the public necessity and convenience to be served by added trains, the large expense to the carrier and its destructive effect upon the carrier's property rights, clearly show that the order is not "reasonable and just and such as ought to have been made in the premises," within the meaning of the statute under which the authority is exerted; the facts and circumstances of the case not making applicable here the principles applied in *Missouri Pac. R. Co. v. State of Kansas ex rel. Railroad Com'rs*, 216 U. S. 262, 30 Sup. Ct. Rep. 330. *State of Florida ex rel., Railroad Commissioners v. South Georgia Railway Company*, 369.

TRAINMEN'S DUTY ARISES WHEN THEY SEE AUTOMOBILE HAS STOPPED ON TRACK.

3. The obligation of a railroad company to a person crossing its tracks in an automobile that has ample time to cross ahead of an approaching train does not begin until the instant its employees see that the automobile has stopped on its tracks, and if from that moment, they do all in their power to avoid a collision with the automobile, but are unable to do so, they are not chargeable with actionable negligence. *Bagdad Land & Lumber Co. v. Moneyway*, 784.

TRAINMEN NOT REQUIRED TO ASSUME AUTOMOBILE WILL STOP ON TRACK.

2. Persons operating a railroad train are not called upon to presume that the engine of an automobile, about to cross a railroad track sufficiently far ahead of the train to enable it to cross in safety, will choke down and cause the automobile to stop on its tracks. *Bagdad Land & Lumber Co. v. Moneyway*, 784.

RAPE.

EVIDENCE INSUFFICIENT TO SUSTAIN CONVICTION OF ASSAULT WITH INTENT TO RAPE.

3. Where the testimony shows that a series of indecent assaults were made, but not with the necessary intent to commit rape by force and without the female's consent, but rather with

Rape.—(*Continued.*)

the intent to induce her consent, and on being convinced that he cannot obtain such consent the defendant voluntarily desists from his attempts without any outside interference, and without any unusual resistance on the female's part, there can be no legal conviction. *Dannelly v. State*, 773.

GRAVAMEN OF ASSAULT WITH INTENT TO COMMIT RAPE IS INTENT.

1. The gravamen of the crime of assault with intent to commit rape is the *intent* with which the assault is made. The *intent* in such cases must be shown by the State to have so possessed the accused that his determination was to consummate the rape, regardless of resistance and want of consent. *Dannelly v. State*, 773.

NO CONVICTION OF ASSAULT WITH INTENT WHERE ASSAILANT VOLUNTARILY DESISTS BEFORE CONSUMMATION.

2. A conviction of the crime of assault with intent to rape will not be sustained upon proof that the assailant voluntarily desisted before consummation, without any outside interference; and with no unusual resistance on the female's part. *Dannelly v. State*, 773.

UNCHASTITY OF PROSECUTRIX PRIOR TO ALLEGED OFFENSE IS MATERIAL.

3. In the prosecution of a male person under Chapter 7732, Laws of Florida, 1918, for having unlawful carnal intercourse with an unmarried female person of previous chaste character who at the time of such intercourse was under the age of eighteen years, evidence of acts of unchastity on the part of such female committed prior to the date of the alleged offense is material and should not be excluded. *Steffanos v. State*, 309.

REFORMATION OF INSTRUMENTS.**RESOLUTION OF CITY COUNCIL EXPRESSING ONLY INTENTION CANNOT BE REFORMED IN EQUITY.**

2. A resolution of a city council when it expresses only the intention of the city, cannot be reformed in equity. *Carr et al. v. City of Kissimmee*, 759.

TAX CERTIFICATES ISSUED BY A CITY MAY NOT BE REFORMED IN EQUITY.

4. A tax certificate issued by a city is not such an instrument that a court of equity may reform. *Carr et al. v. City of Kissimmee*, 759.

WHEN JUDICIAL SALE AND DEEDS THEREUNDER NOT SUBJECT TO REFORMATION STATED.

3. Sales made by operation of law, in which the owner of the land does not participate, and in which there can be no mutual mistake, and deeds issued by virtue of such sales are not subject to reformation. *Carr et al. v. City of Kissimmee*, 759.

REMITTITUR.**REMITTITUR PERMITTED.**

6. A remittitur permitted as stated in the opinion. *Prairie Pebble Phos. Co. v. Silverman*, 541.

SALES.**NO IMPLIED WARRANTY CONFLICTING WITH EXPRESS TERMS.**

3. There is no implication of warranty in conflict with the express terms of the agreement. *Steinhardt v. Con. Gro. Co.*, 531.

PLEA IN ACTION FOR BREACH OF IMPLIED WARRANTY HELD A GOOD DEFENSE.

2. In an action for damages for breach of an implied warranty that a certain feeding stuff sold to plaintiff did not contain

Sales.—(*Continued.*)

Rice Hulls, pleas averring that the commodity was sold to the plaintiff under a complete description and specification and that the goods met in every particular the description and specification set forth in the contract of sale set up a good defense. *Steinhardt v. Con. Gro. Co.*, 531.

SCHOOLS AND SCHOOL DISTRICTS.

COUNTY BOARD OF PUBLIC INSTRUCTION HELD TO HAVE DISCRETION AS TO BOND ISSUE.

1. On an application for a bond issue under the provisions of Section 2, Chapter 6542, Acts of 1913, the County Board of Public Instruction has discretionary power to determine the amount of bonds required for the purposes set forth in the petition. *Steen v. Board of Public Inst. et al.*, 146.

DECREE VALIDATING SCHOOL BOND ISSUE, NOT APPEALED FROM WITHIN 20 DAYS, IS CONCLUSIVE.

2. If no appeal is taken from a decree validating and confirming a school bond issue within twenty days from the rendition of the decree, such decree is forever conclusive of the validity of the bond. *Steen v. Board of Public Inst. et al.*, 146.

VACATION OF DECREE OF CONFIRMATION OF SCHOOL BOND ISSUE MORE THAN 20 DAYS AFTER RENDITION, VOID.

3. An order of the Chancellor vacating a decree of confirmation and validation of a school bond issue, entered more than twenty days after the rendition of the validating decree, is void. *Steen v. Board Public Inst et al.*, 146.

SPECIFIC PERFORMANCE.

CONTRACT TO CONVEY INTEREST AS PARTIES MIGHT AGREE WILL NOT BE ENFORCED, IN ABSENCE OF SHOWING OF COMPLAINANT'S RIGHT.

4. Specific performance of a contract for the conveyance of land which provides in the alternative for the conveyance

Specific Performance.—(Continued.)

of an undivided half interest or a conveyance of a certain part of the land and division fences as the parties might agree upon, cannot be obtained in the absence of any showing of an agreement between the parties as to a division of the lands, the location of lines, or some facts showing the complainant's right to an undivided half interest. *Richardson v. Varn*, 517.

JURISDICTION DEPENDS ON WHETHER DAMAGES AT LAW AFFORD COMPLETE REMEDY.

3. The exercise of equity jurisdiction for the specific performance of contracts for the purchase of property does not proceed upon any distinction between real estate and personal estate, but depends on the question whether damages at law may not in the particular case afford a complete remedy. *LeNoir v. McDaniel*, 500.

NOT DECREED WHERE VENDOR HAS NO TITLE, THOUGH VENDEE ACQUIRES TITLE FROM ANOTHER SOURCE.

2. A vendor in a contract for the sale of lands who has no title to the lands at the time of the contract made, and such land is afterwards acquired partly by the vendee to such contract from another source and under circumstances which would not preclude him from the favorable consideration of a court of equity, and partly by a third person, is not entitled to a decree in equity requiring the vendee to pay the full purchase price for the half interest held by him upon the theory that such interest is held in trust for the complainant vendor. *McCann et al. v. Ware*, 803.

NOT GRANTED TO VENDOR NOT OFFERING COMPENSATION FOR OUTSTANDING INTEREST.

1. Specific performance of a contract for the sale of lands will not be granted in a case where the vendor is the actor demanding the remedy without compensation for an outstanding right in the lands to the extent of an undivided half interest in third persons. *McCann et al. v. Ware*, 803.

Specific Performance.—(Continued.)**REMEDY IS WITHIN DISCRETION OF COURT.**

2. Specific performance of a contract for the sale of lands is not a matter of right in either party, but a matter of sound discretion in the court, controlled by settled principles of law and equity applicable to the particular facts. *Richardson v. Varn*, 517.

STATES.**LAWS ESTABLISHING DRAINAGE DISTRICT HELD NOT TO VIOLATE CONSTITUTION AS TO DRAWING MONEY FROM TREASURY EXCEPT BY APPROPRIATION.**

9. The provisions of Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Laws of Florida, are not in conflict with Section 4 of Article IX of the Constitution which provides that "no money shall be drawn from the treasury except in pursuance of appropriations made by law." See *Lainhart v. Catts*, *supra*. *Bannerman v. Catts et al.*, 170.

STATUTES.**ACT ESTABLISHING EVERGLADES DRAINAGE DISTRICT HELD NOT TO VIOLATE CONSTITUTIONAL PROVISION AS TO TITLE AND SUBJECT.**

10. Chapter 6456, Laws of Florida, as amended by Chapter 6957, Laws of Florida, as amended by Chapter 7862, Laws of Florida, is not in conflict with Section 16 of Article III of the Constitution. The title to Chapter 6456, Laws of Florida, was involved in the case of *Lainhart v. Catts*, *supra*, and was upheld by the court in that case, and we can find no defect, or supposed defect, in the title to Chapter 6957, Laws of Florida, and Chapter 7862, Laws of Florida, that was not disposed of in that case. The title of the respective chapters mentioned clearly relate to the creation of a single district, and not a number of drainage districts throughout the State of Florida, and the language in the body of the Act is not inconsistent with anything contained in the title. *Bannerman v. Catts et al.*, 170.

Statutes.—(*Continued.*)LAWS ESTABLISHING EVERGLADES DRAINAGE DISTRICT
HELD NOT VOID AS SPECIAL ROAD LEGISLATION.

2. The provisions of Chapter 6456, Acts of 1913, Laws of Florida, as amended by Chapter 7862, Acts of 1919, Laws of Florida, are not in conflict with Sections 20 and 21 of Article III of the Constitution of Florida. See also *Lainhart v. Catts*, 73 Fla. 735, 75 South. Rep. 47. *Bannerman v. Catts et al.*, 170.

PROVISION FOR ATTORNEYS' FEES IN SUIT ON MERCHAN-
DISE ORDER IN PAYMENT FOR LABOR NOT COV-
ERED BY TITLE.

3. The provision of Chapter 6914, Acts of 1915, relating to attorney fees, is not covered by the title of the Act as required by Section 16, Article III of the Constitution, and is, therefore, not effective as law. *Prairie Pebble Phos. Co. v. Silverman*, 541.

STATUTE MAKING CATTLE DIPPING COMPULSORY IS A
GENERAL LAW.

14. Chapter 7347, Acts of 1917, is a general law potentially applicable to all the counties of the State exerting a sovereign power of the State for a general State purpose. *Whitaker v. Parsons*, 352.

STATUTES PUNISHING ISSUANCE OF CHECKS AGAINST
INSUFFICIENT FUNDS ASSUMED VALID.

2. Chapter 7263, Acts of 1917, Laws of Florida, and prior statutes of a similar character have in several cases been assumed by this court to be valid and enforceable and a sufficient basis for a criminal prosecution against persons alleged to have violated the provisions of such statutes. *McQuagge v. State*, 768.

Statutes.—(Continued.)

**VOID PROVISION FOR ATTORNEY'S FEES IN STATUTE
MAKING MERCHANDISE ORDER REDEEMABLE IN
CASH HELD NOT TO AFFECT REMAINDER.**

5. An elimination of the provision as to attorney fees does not affect the other portions of Chapter 6914, Acts of 1915. *Prairie Pebble Phos. Co. v. Silverman*, 541.

**WHERE INVALID PORTION MAY BE ELIMINATED, VALID
PORTION OPERATIVE.**

4. Where provisions contained in an act violate some requirement of the organic law, or are not a part of, or properly connected with, the subject expressed in the title of the act, and such part so unconstitutionally or so illegally embraced in the Act can be eliminated or disregarded without destroying the effectiveness of the Act for the purpose intended, the illegal part should be so eliminated or disregarded, and the valid portion held to be operative. *Prairie Pebble Phos. Co. v. Silverman*, 541.

**WORDS OF FIXED AND DEFINITE MEANING PRESUMED
TO HAVE BEEN INTENDED TO HAVE SUCH MEAN-
ING.**

2. Words employed in a statute having acquired a fixed and definite meaning, it will be presumed, in the absence of any definition in the statute, that they were intended to be used in that sense by the Legislature. *Smith v. State*, 315.

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TAXATION.

See Constitutional Law.

EXTENT OF TAXING UNIT FOR PUBLIC PURPOSE DEFINED.

2. The extent of a taxing unit for a public purpose may be confined to a designated district or subdivision that may be or whose inhabitants may be directly and peculiarly benefited by the application of the tax money to the purpose contemplated. *Hunter v. Owens et al.*, 812.

ENTIRE TAX SALE VITIATED BY PARTIAL ILLEGALITY OF TAX.

3. Where a sale is for an entire tax and a part of it is legal and part illegal, the illegal portion vitiates the entire sale. *F. E. C. Fruit Land Co. v. Mitchell et al.*, 291.

REDEMPTION NOT ADEQUATE REMEDY PREVENTING EQUITABLE RELIEF, WHERE STATUTORY PROVISION INCOMPLETE.

5. If a statutory provision on the subject of redemption of lands sold for taxes is not a complete and certain one that applies in all situations, as where it depends on the discretion of the Comptroller, whose discretion cannot be controlled by mandamus, it is not such an adequate remedy as will prevent a court of equity from granting relief. *F. E. C. Fruit Land Co. v. Mitchell et al.*, 291.

Taxation.—(Continued.)

SOLE LIMITATION UPON POWER OF TAXATION MUST BE FOUND IN FEDERAL AND STATE CONSTITUTION.

1. In the exercise of its inherent sovereign powers, the State may impose taxes to be used for a governmental purpose, and the only limitations imposed are those contained in the Federal and State Constitutions, designed to protect personal and property rights against arbitrary and oppressive exertions of governmental power. *Hunter v. Owens et al.*, 812.

STATUTE CREATING IMPROVEMENT DISTRICT HELD VALID.

11. Chapter 7080, Acts of 1915, is not on its face an arbitrary exertion of governmental power oppressive of private rights; and it does not appear that its due operation will violate organic law. Illegality or abuse of authority in applying the statute may be remedied in due course of law. *Hunter v. Owens et al.*, 812.

TAX DEED BASED ON TAX SALE OF SEVERAL PARCELS, AGGREGATED TAXES ONLY BEING GIVEN, VOID.

4. Where several tracts or parcels of land are assessed and sold for taxes, and the amount of taxes assessed upon each of said tracts is not set down or given opposite thereto respectively, in the assessment roll and in the collector's advertisement of sale, but the aggregate taxes assessed on all the different tracts is given only, a tax deed predicated thereon is void. *F. E. C. Frutt Land Co. v. Mitchell et al.*, 291.

TAXING STATUTE FOR CONSERVING PUBLIC HEALTH, ETC., VALID UNLESS IT VIOLATES ORGANIC LAW.

6. Where a statute levying a tax, in terms or in effect, states that it is for the purpose of conserving the public health, comfort and convenience, it may be sustained on that ground, if otherwise valid, unless it clearly appears from the act itself or from a consideration of the circumstances and conditions within which it is to operate, that the law in reality has no fair relation to the public purpose stated or mani-

Taxation.—(Continued.)

justly intended, or that it in effect violates organic law while superficially appearing to serve a lawful public purpose. *Hunter v. Owens et al.*, 812.

THAT PERSONS NOT TAXED MAY BE BENEFITED BY A PUBLIC UNDERTAKING DOES NOT AFFECT POWER OF TAXATION.

3. The object of a tax may be a matter designed to conserve the public health, comfort and convenience of the inhabitants and others in the particular community, and the mere fact that persons who do not share the tax burden may also be benefited by the undertaking, does not affect the governmental power. It is not practicable or contemplated that public benefits shall be shared only by those who bear the burden thereof. *Hunter v. Owens et al.*, 812.

THAT PRIVATE CORPORATION MAY BE ULTIMATELY BENEFITED DOES NOT INVALIDATE STATUTE.

10. While under the Constitution "no tax shall be levied for the benefit of any chartered company of this State," (Sec. 7, Art. IX), yet if a public improvement that is afforded by tax levies, does merely incidentally benefit private corporations along with other persons, the Constitution is not violated in levying the tax for the public purpose, for the law contemplates that corporations shall participate in the burdens and benefits of taxations within appropriate limitations. *Hunter v. Owens et al.*, 812.

VALID ASSESSMENT ESSENTIAL TO VALID SALE.

1. A valid assessment of lands is an essential foundation to proceedings to subject them to sale for non-payment of taxes. *F. E. C. Fruit Land Co. v. Mitchell et al.*, 291.

VALUATION WITH INTENT TO DISCRIMINATE AGAINST NON-RESIDENT OWNER RENDERS ASSESSMENT VOID.

1. An assessment of range cattle by the Tax Assessor in greater numbers than owned by the alleged owner and for a higher valuation than such class of personal property was as-

Taxation.—(*Continued.*)

sessed to other owners in the same county, and without inquiry or investigation either as to numbers or value and for the purpose of discriminating against the alleged owner because he was a non-resident, is void. *Base v. Alderman*, 345.

WHEN ASSESSMENT INVALID BECAUSE OF MISDESCRIPTION IN ASSESSMENT ROLL, STATED.

2. A description of land in the assessment roll, so faulty as not to warn the owner of the charge upon his land or to advise possible purchasers what land is to be sold will invalidate the assessment. *F. E. C. Fruit Land Co. v. Mitchell et al.*, 291.

TRIAL.

See Evidence.

CHARGES MUST BE CONFINED TO ISSUE AND PREDICATED UPON FACTS IN PROOF.

4. Charges of the court to juries must be confined to the issues and must be predicated upon facts in proof. *S. A. L. Ry. Co. v. Royal Palm Soap Co.*, 800.

CHARGES SHOULD BE PREDICATED UPON FACTS IN PROOF, AND NOT BE CONTRARY THERETO.

3. Charges should state the law of the case correctly, and should be predicated upon the facts in proof, and when predicated upon a statement of facts contrary to the uncontradicted and undisputed proofs in the case they are erroneous. *S. A. L. Ry. Co. v. Royal Palm Soap Co.*, 800.

COURT SHOULD DIRECT VERDICT FOR ONE PARTY WHERE EVIDENCE DOES NOT WARRANT VERDICT FOR OTHER.

3. Where the evidence will not warrant a verdict for one party to an action, the trial court should direct a verdict for the opposite party. *Varnes v. S. A. L. Ry. Co.*, 624.

Trial.—(Continued.)**INSTRUCTIONS ON ABSTRACT QUESTIONS OF LAW NOT PERTINENT SHOULD NOT BE GIVEN.**

2. Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the court, and having no relation thereto. *S. A. L. Ry. Co. v. Royal Palm Soap Co.*, 800.

MOTION TO STRIKE TESTIMONY SHOULD BE DENIED IF INCLUDING ANY PROPER TESTIMONY.

3. A motion to strike testimony must not be too broad. If it includes any proper testimony it should be denied. *Natl. Union Fire Ins. Co. v. Cone*, 265.

ON EVIDENCE SUSTAINING JUDGMENT FOR ONE PARTY, VERDICT FOR OTHER SHOULD NOT BE DIRECTED.

3. Where there is substantial evidence to sustain a judgment for one party a verdict for the other party should not be directed, even though a verdict found may properly be set aside for a new trial where other matters of procedure or of law taken in connection with the evidence make a new trial appropriate in order that "right and justice shall be administered," as required by the Constitution. *Citizens & Peoples Natl. Bank v. L. & N. R. R. Co.*, 319.

WHERE EVIDENCE DOES NOT REQUIRE OR LEGALLY SUSTAIN IT, VERDICT SHOULD NOT BE DIRECTED.

1. Where it cannot be fairly said that on the evidence adduced there can be but one opinion among jurors as reasonable men on the issue presented, or that "no sufficient evidence has been submitted upon which the jury could legally find a verdict for" the defendant, a verdict should not be directed for the plaintiff. *Citizens & Peoples Natl. Bank v. L. & N. R. R. Co.*, 319.

TROVER AND CONVERSION.

"CONVERSION" DEFINED.

3. Where there is a taking of chattels with intent to exercise over them an ownership inconsistent with the real owner's right of possession, there is a conversion. *West Yellow Pine Co. v. Stephens*, 298.

ELEMENTS OF "CONVERSION" STATED.

4. The essential elements of a conversion is a wrongful deprivation of property to the owner; neither manucaption nor asportation is an essential element thereof. *West Yellow Pine Co. v. Stephens*, 298.

MARKET VALUE OF STANDING TIMBER AT TIME OF CONVERSION OF LOGS HELD ADMISSIBLE.

1. It is not error for the trial court in a suit for conversion of logs to permit plaintiff over objection of defendant to ask on direct examination as to what the market price of standing timber was at the time of the alleged conversion, and especially where it is shown that the questions and answers immediately following tend to indicate what the value of the logs made from the said standing timber would be at the time of conversion. *West Yellow Pine Co. v. Stephens*, 298.

MEASURE OF DAMAGES FOR CONVERSION OF TIMBER STATED.

2. Where trees are unlawfully but not wilfully cut, and the cut timber, a chattel, is converted, the measure of recovery in trover is the value of the timber at the time and place of conversion, with interest, and there should be no deductions for labor performed upon the timber anterior to the time that the conversion was consummated by actual removal from owner's land. *West Yellow Pine Co. v. Stephens*, 298.

TRUSTS.

See Principal and Agent.

**EXECUTION OF NOTES AND MORTGAGE BY TRUSTEES
HELD NOTICE AS TO THEIR POWERS.**

4. The execution of notes and a mortgage on real estate to secure the payment of such notes by individuals as trustees is sufficient to put persons dealing with such instruments upon inquiry of the powers possessed by such individuals. *Haimovitz v. Hawk, Sr., et al.*, 272.

MARRIED WOMAN HELD TO HAVE PRIOR LIEN FOR MONEY CONTRIBUTED TO PURCHASE OF PROPERTY BY HUSBAND AS AGENT.

4. Where a married woman contributed money toward the purchase of real property by her husband who had accepted from his father a sum of money and a commission to purchase a lot for him, but of which trust she had no knowledge, and the purchase of the real property by the son was in the execution of the commission entrusted to him by his father, but the price paid for the property was greater than the sum of money which the father gave to his son for that purpose by the amount contributed by the wife, the latter has a prior lien upon the property purchased to secure the repayment to her of her contribution. *Jackson et al. v. Jackson*, 557.

**POWERS OF TRUSTEE TO EXECUTE MORTGAGE MUST
BE ALLEGED AND PROVED.**

5. Where the validity of instruments sought to be enforced depends upon whether the persons executing such instruments had power to do so, it is necessary to allege and prove the existence of such power. *Haimovitz v. Hawk, Sr., et al.*, 272.

**RESULTING TRUST ARISES WHERE AGENT TAKES TITLE
TO PROPERTY IN HIS OWN NAME, THOUGH LATER
REIMBURSING TRUST ESTATE.**

3. A resulting trust in real property arises where an agent invests his principal's money in such property with the latter's consent, but takes the title thereto in the agent's name,

Trusts.—(*Continued.*)

and the fact that the agent applies the particular money furnished to him for the purchase to his own use, but later substitutes therefor funds of his own, does not alter the rule. *Jackson et al. v. Jackson*, 557.

VENDOR AND PURCHASER.

CLAIMS OF THIRD PARTIES CONTRACTING FOR LAND WITH KNOWLEDGE OF ESCROW TRANSACTION MAY BE CANCELLED.

5. Where third parties contracted for land with knowledge of an escrow transaction, covering the land, their claims may be cancelled in appropriate proceedings. *Ullendorff v. Graham et al.*, 845.

LOSS OR PROFIT OCCURRING BETWEEN AGREEMENT FOR SALE AND CONVEYANCE FALLS TO VENDEE.

5. From the time the owner of land enters into a binding contract for its sale he holds the same in trust for the purchaser and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen and is entitled to any benefit which may accrue to such land in the interim between the agreement and the conveyance thereof to such vendee. *Felt v. Morse*, 154.

PAROL PROOF OF ADVERSE POSSESSION MAY REMEDY DEFECTS IN TITLE.

4. Where the record title of a vendor seeking specific performance of an agreement to sell and convey land is defective, the lapse may be supplied by parol proof of adverse possession under color of title for the statutory period sufficient to establish ownership, even though the contract calls for a perfect title, but not a perfect record title. *Felt v. Morse*, 154.

Vendor and Purchaser.—(Continued.)**TIME MAY BE MADE OF ESSENCE OF CONTRACT BY SUBSEQUENT NOTICE.**

1. Although time may not be of the essence of the original contract to sell and convey land, it may subsequently be made so by express notice given by a party to the contract who is not in default to the other party who is in default, requiring the contract to be performed within a stated time, which must be a reasonable time according to the circumstances of the case. *Felt v. Morse*, 154.

TO MAKE TIME OF ESSENCE, PARTIES MUST FIX DEFINITE TIME FOR PERFORMANCE.

2. Under a contract for the sale of land where no definite date has been agreed upon for the consummation of the contract, in order to constitute time of the essence of the transaction, the party to the contract entitled to insist upon performance, should fix a definite date in the future for performance, of which the other party thereto is duly notified, which affords to such party reasonable time within which to comply. *Felt v. Morse*, 154.

WITNESSES.**COMPLAINANTS, SUING REPRESENTATIVE, CANNOT TESTIFY TO THEIR TRANSACTIONS WITH DECEDENT.**

1. In a suit in equity against the representative of a deceased person to declare an instrument in the form of a deed of conveyance absolute to be a mortgage, the complainants are not competent witnesses in said suit to testify as to any transactions or communications occurring between them and the said deceased person. *Munroe et al. v. Carroll et al.*, 206.

CONVICTION OF WITNESS OF CRIME ADMISSIBLE TO AFFECT CREDIBILITY.

2. Under the provisions of Section 1097, Revised Statutes of 1892, evidence of the conviction of a witness of any crime is admissible to affect his credibility, and it is error to exclude

Witnesses.—(Continued.)

such evidence from consideration by the jury. *Robinson v. State*, 736.

EVIDENCE NOT ADMISSIBLE UNDER EXCEPTION TO COMMON-LAW RULE PROHIBITING PARTY IN INTEREST FROM TESTIFYING AS TO TRANSACTION WITH DECEDENT.

3. Where under the provisions of Section 2494, General Statutes of Florida, 1906, complainants in a suit against the representative of a deceased person seek to show that a deed absolute in form executed by them was in fact a mortgage the testimony of the complainants concerning their relations with the grantee during his life time, involving communications and transactions with him by which they seek to establish the character of the instrument as a mortgage is not admissible under any exception at common law to the rule prohibiting a party in interest from testifying in a cause. *Munroe et al. v. Carroll et al.*, 206.

STATE MAY CROSS-EXAMINE DEFENDANT AS TO PREVIOUS CONVICTION.

3. Where a defendant in a criminal prosecution testifies as a witness in his own behalf, the State has the right on cross-examination to interrogate him as to whether he has previously been convicted of a criminal offense. *Brown et al. v. State*, 741.

STATUTE CONSTRUED TO REMOVE COMMON-LAW DISABILITY OF WITNESSES BY REASON OF INTEREST.

2. Section 1505, General Statutes of Florida, 1906, relating to the competency of witnesses as affected by interests is an enlargement and not a restricting of the common law rule and removed the common law disability of a witness arising from interest in the event of litigation except in those cases when one of the parties to the transaction or communication was at the time of the examination dead or insane. *Munroe et al. v. Carroll et al.*, 206.

WORK AND LABOR.

NO RECOVERY IN ACTION FOR SERVICES IN ABSENCE OF
VALUE THEREOF.

1. In an action at law where the plaintiff seeks to recover for services rendered by him, he is not entitled to recover therefor in the absence of any evidence as to the value of such services. *Silcox v. Corsa*, 677.

